

# Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms

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Casual treatment of the subject in the literature of sociology tends to assume that the object of mediation is to make the parties aware of “social norms” applicable to their relationship and to persuade them to accommodate themselves to the “structure” imposed by these norms. From this point of view, the difference between a judge and a mediator is simply that the judge orders the parties to conform to the rules, while the mediator persuades them to do so. *But mediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves.*\*\*



## I. INTRODUCTION

Legal theories frequently presume that only a sufficiently powerful, centralized authority can enforce socially efficient rules. Great-grandfather to this theory of social order is Thomas Hobbes, who famously declared that the absence of a “common Power” would make “the life of man, solitary, poore, nasty, brutish, and short.”<sup>1</sup> While a centralized state is clearly necessary to

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\*\* Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307–08 (1971). This Note takes as its starting point concerns over the moral structure of the law, particularly the law’s place in determining the larger social order—issues which Professor Fuller spent a lifetime considering. Not coincidentally, Fuller distinguished himself by his serious appraisal of mediation during its formative years when “mediation was the exception rather than the rule in conflict management.” Marc Hertogh, *The Conscientious Watermaster: Rediscovering the Interactional Concept of Law*, in REDISCOVERING FULLER 365, 368 (Willem J. Witteveen & Wibren van der Burg eds., 1999). For discussion of Fuller’s contributions to mediation, see *id.* at 367–71. See also

achieve certain conditions for human harmony, this tradition has produced a corollary line of reasoning that is much less convincing: It implies, at its extreme, that *only* by resort to a central authority can society create and maintain socially efficient rules.<sup>2</sup>

Among its myriad adherents through the ages, traditional law and economics unselfconsciously absorbed this instrumentalist<sup>3</sup> conception of social utility into many of its leading theories.<sup>4</sup> These scholars nevertheless

Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 13–23 (2000). In the spirit of Fuller's contributions, this Note attempts to stake out a place for a moral conception of the social order firmly rooted in the human capacity for facilitative and reciprocal self-ordering.

<sup>1</sup> THOMAS HOBBS, *LEVIATHAN* 100 (Collier Books 1962) (1651).

<sup>2</sup> Robert Cooter has termed this traditional view of social order as "legal centrism." He argues that this conception of the law suffers many of the same defects as centrally planned market economies. Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1644–46 (1996).

<sup>3</sup> Although "instrumentalism" connotes a complex body of pragmatic legal philosophy, I use the word simply to mean any theory of the law that treats legal rules as the best or only means to solve collective action problems. See Milton C. Regan, *How Does Law Matter?*, 1 GREEN BAG 2d 265, 265 (1998).

<sup>4</sup> For discussion, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 137–47 (1991). See also Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539–42 (1998). Ellickson argues that the "founders of classical law and economics" movement (including Ronald Coase, Guido Calabresi, and Richard Posner) "exaggerated the role of law in the overall system of social control." *Id.* at 537. This had several effects. First, law and economics underestimated rational actors' capacity for self-constraint, their willingness—even at personal cost—to inflict on others non-legal social sanctions (ostracism, gossip, "tit-for-tat"), and their long-term interest in protecting their reputation and perceived self-worth. *Id.* at 539–42. For a discussion of how non-legal sanctions affect the creation and enforcement of contracts, see generally David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990). Second, traditional law and economics tended to overestimate actors' knowledge of the law and their relative concern for legal sanctions.

Outside the law and economics movement, economists increasingly emphasize the impact of privately enforced social norms on market behavior. Many economists now recognize that, "if we are to explain the existence and survival of some of the fundamental institutions of a market economy, we need a richer model of human beings than is provided by the rational, self-interested agent of neo-classical theory." Robert Sugden, *Normative Expectations: The Simultaneous Evolution of Institutions and Norms*, in *ECONOMICS, VALUES, AND ORGANIZATION* 73, 75 (Avner Ben-Ner & Louis Putterman eds., 1998) [hereinafter *ECONOMICS, VALUES*]. See generally *ECONOMICS, VALUES, supra*; FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF*

revolutionized legal theory by recognizing that legal rules create incentives that may be analyzed analogously to price theory. Recognizing that legal rules constrain individual rational choice, they attempted to analyze mathematically the individual and cumulative consequence of these rules. However, these scholars were also prone to exaggerate the probability that non-experts would heed legal rules.<sup>5</sup> Worse still, they could be downright blind to other, equally powerful incentives operating on rational choice.<sup>6</sup>

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PROSPERITY (1995); REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT (Daniel B. Klein ed., 1997) [hereinafter REPUTATION].

<sup>5</sup> See, e.g., A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 39–52 (2d ed. 1989) (hypothesizing that people assess their risks of driving and crossing the street according to legal theories of negligence); see also WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987). The authors generally attribute powerful, behavior-altering incentives to discrete alterations in tort law. According to them, tort rules ideally encourage individuals to invest in measures to prevent harm to others only up to the point where the cost of doing so does not exceed the benefits from avoiding injury. The logical consequence of this approach to law is that a rational person will obey the law only if the benefits of doing so outweigh the probable costs. *Id.*

<sup>6</sup> Somewhat unfairly, perhaps, Ronald Coase's hypothetical demonstration of his famous principle (the so-called Coase Theorem) is generally regarded by social norm scholars as a notorious example. ELLICKSON, *supra* note 4, at 2–4; see also Robert D. Cooter, *Against Legal Centrism*, 81 CAL. L. REV. 417, 419–22 (1993); Ellickson, *supra* note 4, at 540–41. Coase argued that as long as transaction costs remain zero and information is reliable, resources will be allocated optimally, no matter which party faced legal liability. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). In a famous thought experiment, Coase considered the relationship between a hypothetical set of ranchers and farmers. According to Coase, the law of trespass, which places liability on a rancher for his intruding cattle, might be inefficient in a region with many ranchers and few farmers. In such a place, it would be less costly if the ranchers paid to fence the farmers out. The ranchers could then let their cattle roam freely. In a world without transaction costs, a private contract such as this would be more efficient than the default tort rule. The problem with Coase's argument always lay with transaction costs being almost certainly greater than zero. Most law and economics scholars therefore presumed that centralized legal rules tend to place incentives on the party in the best position to prevent or cure them.

A prominent study by Ellickson found an even greater difficulty with the meaning generally attributed to the Coase theorem—the proposition that, as transaction costs increase, so do people's incentives to conform their behavior to rules of law. In a study of actual ranchers in Shasta County, California, Ellickson found that patterns of social behavior between neighbors—the very stuff that falls under the law and economics rubric of “transaction costs”—actually led his subjects to *ignore* the law altogether. Ellickson's fieldwork showed that cattlemen in Coase's hypothetical situation tended to resolve disputes informally without invoking either tort or contract law. Social norms of “neighborliness” and community reputation, and not legal rules, best predict rancher

More recently, scholars from within the law and economics movement have exposed some of the errors and over-generalizations of these traditional theories.<sup>7</sup> Applying insights from sociology and psychology,<sup>8</sup> these scholars have identified extra-legal incentives and non-rational cognitive biases that further influence decisionmaking. Among their contributions has been the realization that people frequently resolve their disputes not by applying legal rules, but rather according to customary practice, or *social norms*.

The term "social norm" broadly encompasses a vast array of behaviors.<sup>9</sup> Whether a behavior qualifies as a social norm depends not on any intrinsic quality, but rather on how a community rewards or sanctions those who

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behavior. In Shasta County, if a rancher's cattle wander onto the property of a farmer, local custom obligates that farmer to notify the owner and to care for the cattle at his own cost, until the owner is able to retrieve them. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 673-75 (1986). Ellickson found that even insurance adjusters (non-ranchers ostensibly knowledgeable about the law) voluntarily choose not to enforce legal rights that are contrary to the ranchers' local customs. ELLICKSON, *supra* note 4, at 94-97.

<sup>7</sup> The literature is large and growing. Book-length contributions to the subject include ELLICKSON, *supra* note 4, and ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); *BEHAVIORAL LAW AND ECONOMICS* (Cass R. Sunstein ed., 2000). To date, no less than four symposia published in major law reviews have addressed the issue of social norms. Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Symposium, *Norms & Corporate Law*, 149 U. PA. L. REV. 1607 (2001).

<sup>8</sup> An important psychological theory that is regarded as crucial by scholars of social norms is the concept of *bounded rationality*. See ELLICKSON, *supra* note 4, at 157; POSNER, *supra* note 7, at 44-46; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1075-84 (2000). Human beings maximize their cognitive abilities to assess costs and predict changes in their environment by the "unconscious use of heuristics." *Id.* at 1076. Although not perfectly accurate representations, these schema are functional calculations that efficiently conserve the time and effort otherwise depleted by more attentive decisionmaking.

The field of cognitive psychology has developed the concept of "script theory." Empirical evidence suggests that people frequently engage in behavior that may be objectively described as "rational," even though they do not possess sufficient knowledge to logically deduce why their behavior is efficient. When engaging in such behavior, people appear subconsciously effected by environmental stimuli—including, crucially, the behavior of others. See Paul J. Heald & James E. Heald, *Mindlessness and Law*, 77 VA. L. REV. 1127, 1151 (1991).

<sup>9</sup> See, e.g., ELLICKSON, *supra* note 4, at 185-204 (discussing extra-legal norms that predict the treatment of cattle trespass among Shasta County ranchers, contract enforcement among close-knit Wisconsin businessmen, and 19th-century whaling practices better than contemporaneous legal rules).

display the behavior.<sup>10</sup> Where a group's members interact over time—thereby creating a web of valuable, interdependent relationships—characteristic patterns of behavior tend to emerge. When a group encourages some behavior, either by providing incentives for conformity or else sanctioning deviants, then that behavior qualifies as a social norm. Social norms are public goods in so far as they solve collective action problems.<sup>11</sup> But just as legal rules mete out damages to those who break them, failure to conform to social norms can sometimes exact costly social penalties enforced by other members of the group.<sup>12</sup>

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<sup>10</sup> Normative standards encompass a wide range of socially conditioned information, ranging from moral judgments (do not lie), to community norms (do not smoke near others), to shared values within a discrete nuclear family (if communicating entails bickering, avoid communicating), to industry-wide practices (construction site risks should be born by contractors). In a review of the scholarly literature, Aviram has pointed out the considerable disagreements over just how “social norms” should be defined. See Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL’Y REV. 1, 5 n.5 (2004). Aviram cites Cooter, *supra* note 2, at 1656–57 (defining social norms as obligations); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1255 (1999) (defining social norms as “all rules and regularities concerning human conduct, other than legal rules and organizational rules”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining social norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (defining social norms as rules that distinguish desirable and undesirable behavior while giving a third party the authority to punish those engaging in undesirable behavior); Lior J. Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 363–64 n.24 (2003) (defining social norms as “behavioral regularities that arise when humans are interacting with each other, regardless of whether that interaction is face-to-face”); and Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining social norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).

<sup>11</sup> See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms with Special Reference to Sanctions*, 19 INT’L REV. L. & ECON. 369, 370 (1999). According to Posner and Rasmusen, “A norm is even more of a public good than a law, because no one person or political party can claim credit for creating a norm.” *Id.* However, norms are only ever enforced voluntarily. Frequently, such enforcement exacts reciprocal (“bilateral” or “multi-lateral”) costs on the agents who enforce them. Since norm enforcement is typically a two-edged sword, the external costs of enforcement must be at least equal to the value of preserving the norm.

<sup>12</sup> *Id.* at 370–77. Posner and Rasmusen outline six types of sanctions: (1) *automatic sanctions* (violating the norm is inherently costly—for example, driving on the wrong side of the road); (2) *guilt* (internal feelings experienced during or after norm-violation); (3) *shame* (internal feelings experienced when one discovers that others know about

Among its benefits, social norm theory can account for behaviors that are inexplicable by rational-choice models that posit state intervention as the only extrinsic check on self-interested behavior.<sup>13</sup> In a more positive sense, social norms provide their own incentives on behavior that may interact with legal incentives in complex, sometimes unpredictable ways.<sup>14</sup> Part of their unpredictability stems from the fact that norms tend to persist even when the self-interested rationale for them has abated.<sup>15</sup>

Consider, for example, the simple social norm of leaving tips.<sup>16</sup> Social norm theory explains why vacationers leave tips at restaurants to which they

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one's violation of a norm); (4) *informational sanctions* (an enforcing agent signals—or, as in the case of blackmail, threatens to signal—information about the violator that he would prefer others not know); (5) *bilateral costly sanctions* (an agent who discovers the norm-violation spends resources to punish the violator—revenge is a classic example); (6) *multilateral costly sanctions* (once the norm-violation is discovered, multiple agents spend resources to punish the violator—ostracism and gossip are classic examples). *Id.*

<sup>13</sup> The practice of identifying and analyzing social norms has long been used by sociologists to explain the social control of individual behavior. The innovation of rational choice models (also called “game theory”) now provides greater analytic precision for the study of social norms. See Ellickson, *supra* note 4, at 542.

<sup>14</sup> Eric A. Posner has described the relationship between social norms and legal rules as a dynamic interaction between background and foreground:

The law is always imposed against a background stream of nonlegal regulation—enforced by gossip, disapproval, ostracism and violence—which itself produces important collective goods. The system of nonlegal cooperation is always in some ways superior and in other ways inferior to the legal solution, and legal intervention will undermine or enhance the background norms of nonlegal cooperation in complex ways. The desirability of a proposed legal rule, then, does not depend only on the existence of a collective action problem on the one hand, and competently operated legal institutions on the other hand. It also depends on the way nonlegal systems always already address that collective action problem and the extent to which legal intervention would interfere with those nonlegal systems.

POSNER, *supra* note 7, at 4.

<sup>15</sup> If adherence to a social norm is efficient most of the time, it is likely to become habitual. In which case, it is susceptible to the biases of “repetition” or “tradition,” heuristics that frequently develop to reduce the costs of decisionmaking. Such constraints on decisionmaking are “often quite rational in a global sense, because they permit us to approximate utility-maximizing behavior at a reasonable cost . . .” Korobkin & Ulen, *supra* note 8, at 1114. However, such biases may continue to influence individual choice, even when reliance on them would be “suboptimal,” or even costly.

<sup>16</sup> See W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 10–11 (2002) (“Rational-choice theory predicts that the customer will leave without tipping; since she is a tourist, she will suffer no reputational injuries as a result of stiffing the server . . .”). The fact that people actually do leave appropriate tips, even when the prospect for sanctions is removed, suggests they are not acting purely in accordance with rational self-interest. *Id.*

are unlikely ever to return—a behavior that the traditional, rational-choice postulate of self-interested *homo economicus* can only regard as aberrantly irrational.<sup>17</sup> The theory suggests that a social norm having an intrinsic utility is likely to be maintained even when the repercussions for non-conformity are attenuated, or even removed.<sup>18</sup> People have strong incentives to adapt their practices to social norms. As long as some of a group's members (though not necessarily all) regard a norm as sacrosanct, practice it, and occasionally enforce it, others members will generally behave in ways that uphold the norm.

This Note is premised on the idea that law and economics models of mediation, which advocate predictive settlement, fail to take into consideration relevant social norms. Like other law and economics theories, they suffer the defect of being unduly instrumentalist. The appropriate corrective entails more focus on the extra-legal incentives that influence the parties' settlement choices. The subject of mediation is ripe for the application of social norm theory. Greater appreciation for social norms can enrich mediation practice.<sup>19</sup> Parties in mediation (and especially lawyers) tend to invest considerable time and money into gaining better legal understandings of their dispute without similarly attending to the social norms that underlie the parties' relationship. They thus tend to overvalue the costs of legal damages and undervalue the costs of normative sanctions. Mediators who can correctly appraise these interests add value to the process of mediation. Rather than viewing social norms merely as transaction costs,

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<sup>17</sup> Avner Ben-Ner & Louis Putterman, *Values and Institutions in Economic Analysis*, in *ECONOMICS, VALUES*, *supra* note 4, at 1, 18 (describing the traditional characteristics attributed to the self-interested, rational actor, *homo economicus*).

<sup>18</sup> While this may be true insofar as norms operate on individuals, a group's dynamics can change very rapidly when the economic rationale for a social norm no longer exists. Cooter, *supra* note 2, at 1654–55. As soon as western-style real estate markets developed in Papua New Guinea, the indigenous Tolai people relinquished their traditional custom of granting deference to local chiefs in matters of land distribution. They feared that these chiefs might sell communal lands to outsiders. *Id.*

<sup>19</sup> For instance, mediators seem to take greater cognizance of the social norms that underlie most business relationships than do courts. A survey of in-house counsel, outside counsel, and non-lawyer executives found that “the strongest correlates of belief in mediation” for all groups were the “[perceptions] that mediation helps preserve business relationships.” John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 *HARV. NEGOT. L. REV.* 137, 214 (2000). Furthermore, the survey found that “[r]espondents overwhelmingly [82%] believe that ADR is much more sensitive to business concerns than the courts are.” *Id.* at 186–87. For a discussion of the social norms underlying business relationships, see POSNER, *supra* note 7, at 148–66.

mediators should treat them as separate components of the dispute—as “chips” that can be “traded off” against legal damages.<sup>20</sup>

Under the right circumstances, mediation can add considerably more value (both collectively and individually) than a court can, simply because the process treats social norms as valid components of dispute resolution. Two factors elevate the significance of social norms in mediation:

- A. Early mediation: Mediating early—that is, before formal discovery—not only saves transaction costs, but it also increases the likelihood that the parties will honor efficient extra-legal social norms. Additionally, it provides an opportunity for the parties to discuss those norms, test them, and reject or alter them if need be.
- B. Specialized knowledge: Where networks of relationships are enduring, mediators who understand these networks will better predict the likelihood of normative sanctions and appraise their potential costs to the parties. Such specialized mediation forums are particularly valuable whenever (1) a dispute takes place inside a network of relationships having its own “institutional infrastructure,”<sup>21</sup> or else (2) the law governing the dispute is transactional in nature.<sup>22</sup> Employment, franchiser-franchisee, and construction disputes are all excellent examples.

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<sup>20</sup> Certain social norms already play a crucial role in all settlement discussions, whether mediated or not. Confidentiality agreements, for example, implicate the “reputational capital” that is crucial to enforcing many social norms. Such agreements are a classic defense against non-legal collective actions, such as gossip and ostracism. Lawyers and mediators universally consider their value during settlement proceedings.

<sup>21</sup> See Aviram, *supra* note 10, at 6 (Private legal systems “do not form spontaneously but build on existing institutional infrastructure: networks that originally facilitated low-enforcement-cost norms.”).

<sup>22</sup> Contract law, the principle vehicle for upholding transactional regimes, effectively harnesses the power of the state to enforce the norms to which the parties have obligated themselves. At least concerning the sale of durable goods, Article 2 of the Uniform Commercial Code (U.C.C.) (as supplemented by Article 1) enhances the state’s authority to enforce social norms. Those sections provide for additional gap-filling measures like “reasonable commercial standards” (U.C.C. § 2-103(b)), and “course of dealing and usage of trade” (U.C.C. § 1-205). As Lisa Bernstein has pointed out, Karl Llewelyn, in his original drafts of Article 2, even envisioned the use of merchant juries to determine such practices, a practice that harkens back to the *lex mercatoria* of the medieval period (discussed *infra*). See Lisa Bernstein, *Formalism in Commercial Law: The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 711 n.4 (1999) (citing National Conference of Commissioners on Uniform State Laws, *Report and Second Draft: The Revised Uniform Sales Act* § 59(I)(a), (d), at 254 (1941)).



However, an awareness of relevant social norms may improve mediation even if disputes are not especially likely to provoke social sanctions. Even when relationships are coming to an end, the parties are contentious, or the social network can only weakly police itself, the powerful residual effects of social norms can still somewhat abate the effect of legal rules.<sup>23</sup>

Part II of this Note argues that law and economic theories of mediation have generally had a detrimental impact on mediation practice. By focusing strictly on predictive settlement, these models are frequently at cross-purposes with the broader goals of mediation. They fail to account for empirical research into the negotiating habits of expert consumers of mediation. Whereas most disputants use mediation on the eve of trial (when legal information is greater), those who use mediation expertly are more likely to use mediation *before* formal discovery has taken place (when transaction costs are lower). They are also more likely to bring clients to mediation. Not only do these habits reduce transaction costs, but they can also improve mediation outcomes. At least in part, this improvement occurs because of the parties' increased reliance on social norms.

Part III of this Note compares and contrasts two historical developments. Social norm scholars, who generally advocate for "decentralized" social enforcement, have generally regarded the Law Merchant (*lex mercatoria*) that developed in medieval trading fairs as a paradigm example of social norms informing and improving legal practice. From the 12th through the 17th centuries, this "natural law of merchants" was arbitrated inside quasi-private courts called piepowder. These forums relied on actual merchant practice to establish rules capable of facilitating an emerging commercial order. Contemporary developments in the private resolution of construction disputes show remarkable parallels to this medieval system. They offer a modern example of how industry or social groups can cooperatively utilize mediation to promote decentralized self-control over their own disputes.

Finally, this Note closes with some suggestions for further research. By incorporating theories of social norms, the predictive settlement theory of mediation can acquire greater analytic precision. More than simply a theoretical corrective, however, an understanding of social norms can actually improve mediation practice.

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<sup>23</sup> See *infra* notes 182–87 and accompanying text.

## II. LAW AND ECONOMICS' PREDICTIVE SETTLEMENT MODEL: NEW RESEARCH CASTS DOUBTS

A new generation of law and economics scholars has committed itself to reconciling classical law and economics with a greater appreciation for extra-legal influences on human behavior, especially the social incentives and cognitive influences that inform and constrain individual choice.<sup>24</sup> Empirical evidence and theoretical support from this field over the last decade suggests that informal, decentralized methods of social control (i.e., social norms) create incentives that are as powerful determinants of rational choice as are legal rules.<sup>25</sup>

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<sup>24</sup> At least one of law and economics' "founders" has endorsed social norm theory as an opportunity for greater economic precision and as a richer, more empirical alternative to "academic moralizing." See Posner & Rasmusen, *supra* note 11; Richard Posner, 1997 *Oliver Wendal Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1641 (1998).

<sup>25</sup> For examples of social norms that operate without state enforcement, see ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 73–87 (1984) (discussing the policy of "Live and Let Live" during WWI trench warfare, in which enlisted soldiers on both sides refused orders to fire at visible enemy combatants standing behind official lines); Marc Ryser, *Sanctions Without Law: The Japanese Financial Clearinghouse Guillotine and Its Impact on Default Rates*, in REPUTATION, *supra* note 4, at 225, 225–40 (discussing Japanese banking clearinghouses that agree voluntarily to monitor bill and check transactions and collectively suspend issuers of defaulted notes); Aviram, *supra* note 10, at 3–4 (discussing the *Pax Dei* movement of the middle ages, by which feudal "warlords" made solemn oaths to commoners that they would abide by rules of warfare for the benefit of non-combatants); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83 (1989); Posner & Rasmusen, *supra* note 11, at 376–77 (discussing the Amish practice of "shunning," by which members of the community ostracize norm-violators).

# A. Mediation as Predictive Settlement: Looking at Mediation Through Instrumentalist Lenses

Mediation<sup>26</sup> provides a fertile—and largely neglected<sup>27</sup>—opportunity to further distinguish the classical law and economics movement from the emerging one that incorporates social norms.<sup>28</sup> Consider that classical law and economics treats mediation and other non-binding alternative dispute resolution (ADR) processes mostly as predictive settlement devices.<sup>29</sup> One

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<sup>26</sup> Mediation is a form of ADR in which parties negotiate their dispute in the presence of a neutral third party (the mediator). Unlike arbitrators, mediators are not authorized to issue orders. Although most frequently used to settle pending litigation, mediation can be quite effective in other contexts as well. See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 111–12 (4th ed. 2003).

<sup>27</sup> But see Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997). Waldman advocates the view that different bargaining contexts require very different approaches to social norms. Waldman is among the very few mediation scholars who has consciously absorbed sociological theories of social norms. She differentiates three approaches for applying social norms in mediation: the “norm-generating” (*Id.* at 710–23), “norm-educating” (*Id.* at 723–42), and “norm-advocating” (*Id.* at 742–56) approaches. Notably, Waldman’s tripartite model does not differentiate between legally enforced and extra-legal social norms, but rather conflates them. Nor does she describe social norms in the rational choice context as law and economics scholars have.

<sup>28</sup> Alternatively, a substantial and growing literature exists on the relationship between arbitration and social norms. Lisa Bernstein, for example, has studied specialized commercial arbitration forums for cotton mill operators, grain distributors, and diamond sellers. These forums resolve disputes (typically alleged contract breaches) according to industry norms, rather than by resort to the official legal system. See, respectively, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Cotton Industry*]; Bernstein, *supra* note 22; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond Industry*].

<sup>29</sup> See Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1–28 (1995). Shevell concedes that dispute resolution which is “nonbinding” and “ex ante” (as, for example, mediation by prior agreement) can “increase joint value” in a relationship between contracting parties (i.e., both are enriched). But his model holds that a party will never take less than the probable legal result (less transaction costs). In addition, he disregards the possibility that such parties might generate creative, value-producing outcomes in “ex post” ADR. *Id.* at 5–6.

Similarly, applications of “decision analysis” to mediated settlement tend to treat the process as a binary choice between outcomes in which “transaction costs” and court “awards” are the crucial factors. See, e.g., Marjorie Corman Aaron & David P. Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, in MEDIATING LEGAL

prominent economic model explains that "[t]he main reasons why ADR may appeal jointly to parties ex post is that it may constitute a cheap substitute for trial or that it may provide them with information about the trial outcome and thus make settlement more likely."<sup>30</sup> According to this theory, all ex post dispute resolution takes place under the shadow of predicted legal outcomes, since "the plaintiff's relative optimism about winning—is what makes for trial."<sup>31</sup> Therefore, if "the parties' beliefs are not too far apart, the savings in trial costs will lead them to settle."<sup>32</sup> Otherwise, they will not settle.

Analytical models of dispute resolution produced by law and economics scholars embody the presumption that parties' rational choice to settle entails little more than predicting legal outcomes.<sup>33</sup> As informational asymmetries about a case's likely outcome abate, rational parties will tend to move toward settlement. The usefulness of mediation is little more than its predictive value, defined as the difference between the parties' expectations of damages after mediation minus the sum of their estimated trial expenses.<sup>34</sup>

This economic model predicts that settlement negotiations will tend to lead to the greatest expected returns for both parties. As one prominent scholar put it, "parties will agree to settle if and only if that is superior to trial for both."<sup>35</sup> Ultimately, though, what constitutes a "superior" settlement is defined in a purely instrumentalist fashion. A typical formula defines "superior" this way: If the net transaction costs are perceived to be greater than the expected plaintiff award multiplied by the net value of all parties'

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DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 307, 307–34 (Dwight Golann ed., 1996); David P. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOT. L. REV., 113, 133 (1996).

Richard Posner has discussed ADR in the context of summary jury trials. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). Posner views such techniques as only mildly beneficial for reducing court congestion and downright harmful to those parties adamantly pursuing litigation. Sticklers for distinctions among dispute resolution devices may object that summary jury trials share little in common with mediation. But there is now considerable evidence that courts utilize both for roughly the same ends. See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 123 (2002).

<sup>30</sup> Shavell, *supra* note 29, at 9.

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 21–28.

<sup>34</sup> *Id.* at 24.

<sup>35</sup> *Id.* at 23.

predictions about the trial's outcome, then settlement is rational.<sup>36</sup> So, for example, a rational plaintiff will settle if he is offered \$12,000 in lieu of a trial where parties agree he has a 50% chance of winning \$40,000 at a cost of \$10,000 for court and legal fees. Predicted value of trial is  $(\$40,000 \times 0.5) - \$10,000$ , or \$10,000. Since \$12,000 is greater than \$10,000, not settling would defy good sense.<sup>37</sup>

Of course, all this depends crucially on the mediation meeting "the laws of conditional probability,"<sup>38</sup> which requires that the mediation's actual predictive value closely approximate the probability perceived by both parties after engaging in it.<sup>39</sup> This value notably differs from the *actual* legal outcome.<sup>40</sup> Yet, since people are not liable to be taken in so easily, only a mediation that very nearly predicts the true value a court would distribute (minus transaction costs) will convince well-informed parties to settle.<sup>41</sup> Thus, a mediator adds value only if she can improve information about probable trial outcome.

Despite its apparent ingenuity and elegance, the theory that mediation is most rationally employed as a predictive settlement device is actually quite

<sup>36</sup> *Id.* at 23.

<sup>37</sup> The theory assumes that, rather than being high-stakes gamblers, parties will generally avoid risk. Rather than seeking to maximize wealth, they will tend to maximize "utility." In which case, "the first dollar one owns is [deemed] more valuable than the second dollar, or the first \$10,000 one owns is more valuable than the second \$10,000, etc." Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 117-18 & n.13 (1996).

<sup>38</sup> Shavell, *supra* note 29, at 22.

<sup>39</sup> *Id.* at 22. *But see supra* notes 27, 31, and accompanying text.

<sup>40</sup> Law and economics models of settlement negotiations do not accurately predict settlement figures. On average, settlements are considerably lower than the theory would predict. *See* Rachlinski, *supra* note 37, at 149-60 and accompanying notes (citing empirical research showing that, on average, settlement offers were lower than those predicted by law and economic models); *see also* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 354, 357, 369, 374-75 (1991) (showing lower than predicted settlements for personal injury, vehicular negligence, consumer, and employment disputes respectively). Rachlinski attributes this divergence to cognitive biases associated with risk framing. He hypothesizes that defendants—because they wish to prevent losses—tend to seek risk. Plaintiffs, on the other hand, seek to conserve gains, and so they tend to be risk averse. Rachlinski, *supra* note 37, at 159-60. One alternative hypothesis is that defendants (especially ones that are wealthy or subject to repeat litigation) will seek to avoid reputations of being pushovers at the settlement table. Because they consider settlement's possible long-term effect on their reputation, they tend to view settlement as implicitly costly.

<sup>41</sup> Shavell, *supra* note 29, at 23-27.

deceptive. It follows directly from an inordinately instrumentalist conception of rational choice, one that attributes maximal social efficiency to precise conformity with legal rules. Adherents of the predictive settlement model treat the law as the sword of Damocles hanging ominously over the whole mediation process.

Of course, so long as one party considers its interest better served by litigation, that party can leave the table or else threaten to leave, effectively forcing other parties to make concessions or take their cases to court.<sup>42</sup> But when law and economics' scholars presume such behavior to be maximally rational, they are engaging in rank positivism. The shadow of the law may be long, but it is not unbounded; nor is it the only shadow hanging over settlement.<sup>43</sup>

The notion that transaction costs<sup>44</sup> are the only source of new value in mediation, be it *ex post* or *ex ante*, suffers all the errors attributed to classical law and economics by those in the movement who have taken notice of social norms. The predictive theory of mediation exaggerates the effects of legal incentives on the parties' choices, going so far as to treat them as the only forces of real consequence. It implies that mediation is only useful if the mediator, or at least the process itself, can signal to all disputants the *same* legal outcome, though not necessarily the correct one.<sup>45</sup> The predictive theory exaggerates the abilities of disputants<sup>46</sup> and mediators<sup>47</sup> to

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<sup>42</sup> As a statistical occurrence, the parties' "day in court" will almost certainly be elusive. Only 2.9% of state cases and 5.0% of federal cases (excluding asbestos claims) ever get to litigation. Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 442-45 (1996). More often, abortive mediation means later settlement negotiations. To some lawyers, this very situation begs the question of what a mediator is good for. After all, most lawyers and even many clients are capable negotiators. According to Robert Baruch Bush, the presence of a neutral party lowers the strategic and cognitive barriers to effective negotiation. Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 8-14 (1996).

<sup>43</sup> Lande, *supra* note 19, at 152 & n.49.

<sup>44</sup> The term "transaction costs" could denote a sophisticated analysis of the economic consequences of settlement versus trial ("What are the economic consequences of a diminished reputation?," "If my ex-wife and I are not sociable in the future, what costs will that entail?," etc.). However, the law and economics literature typically treats transaction costs as mere shorthand for "court costs."

<sup>45</sup> While the theory does not actually propose that the mediator *can* predict the correct trial outcome, it casts doubt on the usefulness of any mediation that does not move the parties towards similar estimates of trial outcome. Shavell, *supra* note 29, at 18-19, 28.

<sup>46</sup> Empirical evidence suggests that people grossly miscalculate and/or misapply even those legal rules that affect them personally, and do not make a diligent effort to

meaningfully evaluate legal rules. It devalues social context and ignores the social roles of the disputing parties, implying that the inclusion of such factors in their settlement calculations defies logic.<sup>48</sup>

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identify those rules before making decisions with legal consequences. Stewart Macaulay, *Non-Contractual Relations in Business: a Preliminary Study*, in *FIRMS, ORGANIZATIONS, AND CONTRACTS: A READER IN INDUSTRIAL ORGANIZATION* 339, 344–47 (Peter J. Buckley & Jonathan Michie eds., 1996) (explaining that even such presumably in-the-know actors as American businesspeople frequently sign contracts without any useful comprehension of their legal consequences); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 122–34 (rev. ed. 1980) (stating that insurance adjusters usually grant awards to the seriously injured even when their claims have no legal merit; they also apply comparative negligence principles in jurisdictions where contributory negligence constitutes a complete defense); Pauline T. Kim, *Norms, Learning, and the Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999) (noting that workers in California, New York, and Missouri misunderstand their states' default rules of employment at will and therefore consistently overestimate their legal rights). Furthermore, no matter what their legal knowledge, disputants frequently succumb to the "overconfidence bias," seeing their side of the dispute in the best possible light. See Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 & n.22 (1998) (noting that nearly 200 articles indicate the frequency of such biases).

In addition, clients, who depend on attorneys to correctly evaluate mediation's predicted value, frequently overestimate their counsels' legal knowledge. See Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 166–67 (2001).

<sup>47</sup> Anyone who wonders how mediators actually "predict" legal outcomes should consider the mediated settlement that was litigated in *Allen v. Leal*, 27 F. Supp. 2d 945, 946–47 (S.D. Tex. 1998). After their minor son was shot by a Bellair, Texas, police officer, the Allens entered mediated negotiations with the city's attorney. They later charged that the mediator had used intimidation to force the Allens' to accept a cash settlement of \$90,000. *Id.* For an eye-opening discussion of the case, see Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 9–13 (2001).

Lawyers frequently allege that mediators (including retired judges) do not adequately research the law before making evaluative predictions. See Anne S. Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 175–78 & n. 89 (1994); James J. Alfani, *Trashing, Bashing, and Hashing it Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U.L. REV. 47, 66, 69–71 & n. 95 (1991).

<sup>48</sup> Richard H. Weise, who "mainstreamed" the use of ADR at the Motorola Corporation has described law and economics' "decision-tree" analysis as "just the beginning" of ADR economics. He argues that the real key is educating outside counsel about the economic value of the business practices of the client. "While the client wants to stop the cash bleeding, resume valuable relationships with customers, suppliers, and governments and cap monumental exposures, outside counsel continues to employ every

Precisely as it elevates the role of the law, the theory debases the parties' ordinary reliance on normative standards (social norms) to appraise the "meaning" of the dispute. It predicts that the parties' alternatives to a negotiated agreement<sup>49</sup> will include various permutations of legal outcomes from which they may deduct the increasingly greater transaction costs necessary to achieve such results. However, these calculations too frequently neglect any of the non-legal sanctions or valuations that clients might otherwise consider relevant.<sup>50</sup> What is worse, some consumers and practitioners of mediation have absorbed this theory,<sup>51</sup> and treat it as a

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available associate to turn over every rock on the path to the courthouse." Richard H. Weise, *Taking Charge*, DISP. RESOL. MAG., Summer 2000, at 12, 13-14.

<sup>49</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99-106 (Bruce Patton ed. 2d ed. 1991).

<sup>50</sup> Consider, for example, the non-legal sanctions that follow a breach in a commercial contract relationship. The breaching party may sustain damage to his reputation—a sanction that, depending on the size and anonymity of the market, can range from negligible to fatal. A second type of non-legal sanction is the divestiture of a disputant's own perception of his or her self-worth. Even if a court reduces or eliminates legal culpability, breaching parties may still regard themselves as less competent or trustworthy. See Ben-Ner & Putterman, in *ECONOMICS, VALUES*, *supra* note 17, at 18 (explaining that economists are prone to undervalue the cost of non-rational, internalized sanctions like guilt). But see POSNER, *supra* note 7, at 43-44 (arguing that psychological theories of guilt are undeveloped and cannot accurately predict behavior).

Beyond sanctions which merely harm a party's reputation or business prospects are actual material sanctions. Consider that a non-breaching party will sometimes remain in possession of some valuable relationship-specific asset (a bond) that once belonged to the breaching party. Some familiar examples are a franchisor's ability render a franchisee's investment worthless by revoking their privileged use of a trademark, an investor stopping a line of credit after a shareholder dispute, and termination of an uncompleted construction contract by a known expert (suggesting loss of both material and reputational bonds). Charny, *supra* note 4, at 392-97. All of these kinds of sanctions may be ameliorated or eliminated by a successful mediation, but doing so requires the parties to attend to these issues while bargaining.

<sup>51</sup> Mediators have increasingly joined lawyers in endorsing mediation as a predictive settlement device. Bush, *supra* note 29, at 114. Mediators who engage in predictive settlement may resort to strong-arming. For example, they may "trash" the parties' legal arguments until the disputants "put 'realistic' settlement figures on the table," or else "bash" those offers until both sides can agree. Alfini, *supra* note 47, at 69-71 (citing interviews conducted with lawyers and mediators). Although Alfini found lawyers in his study who endorse such practices, even some who complained that certain mediators are "not pushy enough," other lawyers regard these tactics as contrary to the best interest of the parties. *Id.* at 70-71.

Stipanowich cites as a warning the behavior of one mediator who was also a practicing construction attorney. Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 371-72 (1998). Engineers at a



bastion of realism in a field that allegedly tilts towards the "mushy" and the transcendent.

### B. Response by the Mediation Movement

For quite some time now, mediation scholars have lamented attempts to reduce mediation to a predictive settlement device.<sup>52</sup> They raise concerns that the perception of mediation as a substitute for adjudication diminishes parties' opportunities to maximize social utility for their full array of interests. Most agree that parties who enter mediation in pursuit of predictive settlement reduce their likelihood of gaining the most value from the process. However, no one has yet demonstrated in a thoroughly coherent way *how* predictive settlement has this effect; or, more importantly, how it might be *otherwise*. What is more, even the fiercest critics of predictive settlement admit that such practices are currently in wide demand.<sup>53</sup> Judges, most of whom support ADR devices as palliatives for court congestion, have viewed with skepticism the claims of mediators that the process can produce outcomes that deviate from legal rules.<sup>54</sup>

An analytical model of mediation that fully incorporates the economics of social norms would go a long way towards improving the blunt, predictive

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"leading architectural engineering (A/E) firm" procured his services in the interest of strengthening relations with a major contractor with whom they were in dispute. Although the engineers believed the relationship reparable, the mediator actually frustrated this goal. "To the client's horror, no opportunity existed to enter into mutual discussion or seek a consensus of any kind—only a 'shuttlecock dicking' over dollars." *Id.*

<sup>52</sup> In 1991, the Florida State University Law Review published a series of important articles in a symposium issue addressing the downside of using mediation as a predictive settlement device. See Alfini, *supra* note 47; Craig A McEwen, *Pursuing Problem-Solving or Predictive Settlement?*, 19 FLA. ST. U. L. REV. 77 (1991); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991).

<sup>53</sup> Among the earliest, and rightly famous, of these critics is Carrie Menkel-Meadow, who has described mediation as a history of "legal innovation co-opted," or "an ironic tale of the unintended consequences of social change and legal reform." Menkel-Meadow, *supra* note 52, at 1. For more recent criticism, see Welsh, *supra* note 47, at 4–5, 23–27, and Bush, *supra* note 29, at 111–14. Bush has approached these practices with an attitude of "if you can't beat them, regulate them." Bush, *supra* note 29, at nn.39–42 and accompanying text. According to him, mediation that aims at predictive settlement *should* be recognized as the practice of law, and strictly reserved for lawyers. *Id.* at 372.

<sup>54</sup> See, e.g., Judith Resnik, *Many Doors, Closing Doors: Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 254 n.172, 265 n.217, and accompanying text (1995).

settlement model. A fully realized model would have a variety of benefits. First, it would expand law and economics' predictive-settlement model by identifying and assigning values<sup>55</sup> to extra-legal incentives that additionally influence disputants' choice to settle. In addition, it would provide a methodology for mediation design and mediator practice that incorporates evaluative, problem-solving, and transformative tools in an appropriate way, rather than simply an ideological way.<sup>56</sup> Perhaps most importantly, it would identify the conditions under which mediation might help cohesive blocks of cooperators to maintain and even maximize net benefits within the group, a phenomenon that Robert Cooter aptly terms the "utilitarianism of small groups."<sup>57</sup>

Evidence from industry-specific arbitration systems already indicates that intra-group commitment to ADR can maintain utility-maximizing group

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<sup>55</sup> The assignments of quantitative value to reputational capital or social norms may strike some as merely arbitrary. But it is really no less so than the practice of assigning unscientific probability (p) values to parties' chances of winning at trial. See Shavell, *supra* note 29, at 22; cf. GOLDBERG ET AL., *supra* note 26, at 356 (asking whether decision analysis is a "somewhat refined and attenuated example of 'garbage in, garbage out'"). Consider too that juries may be called on to assess the loss of reputation in dollar values and that constitutional plaintiffs frequently spend profusely in order to establish new social norms. See Charles Lane, *An Allegiance to Dissent: Man's Challenge to "Under God" is One of Many*, THE WASH. POST, Dec. 2, 2003, at A1 (describing the pursuit by activist Michael Newdow, an attorney and medical doctor, to remove "under God" from the Pledge of Allegiance; Newdow, who has "all but ceased working," tells reporters, "I had \$3 million, but I'm going to end up bankrupt.").

<sup>56</sup> Even in the tentative form produced here, this model generally supports facilitative methods of mediation but with the caveat that facilitation will necessarily be less effective for some disputes than for others. It also predicts that creative problem solving becomes increasingly difficult as the dispute nears trial, mostly because parties have invested in a legal frame to the detriment of other kinds of frames. In general, it is probably true that opportunities for genuine transformation via mediation are likely to be rare, but not so extraordinary as to foreclose mediators' interest in this possibility. To borrow terms from Sunstein, transformative mediation is an opportunity for "norm entrepreneurs" (among disputants or even mediators) to expend reputational capital (and probably even real capital) in the hopes of convincing others to adopt, or at least consider the adoption of new social norms ("norm cascades"). Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029-33 (1996).

<sup>57</sup> Robert D. Cooter, *Law From Order: Economic Development and the Jurisprudence of Social Norms*, in A NOT-SO-DISMAL SCIENCE: A BROADER VIEW OF ECONOMICS AND SOCIETIES 228, 229-30 (Mancur Olson & Satu Kähkönen eds., 2000) (explaining "the tendency of small groups to develop efficient rules for cooperation among members").

norms that deviate somewhat from legal rules.<sup>58</sup> While evidence suggests that social norms operate in large, anonymous groups as well as tightly knit ones,<sup>59</sup> there is good reason to believe that disputants belonging to the latter can maximize the utility of social norms in ways that the former cannot.<sup>60</sup>

The increasing prominence of mediation relative to arbitration in the ADR universe need not be an occasion for despair over lost ideals.<sup>61</sup> If changes in the market for ADR suggest anything at all, it is that consumers of mediation are not all alike. Thus, there is no need for all mediators to be alike. Mediators, like other producers of services, can increase their marketability by providing more value. Doing this requires that they partner with ADR consumers, inform them, and also *become informed by them*.<sup>62</sup> This last notion is crucial because, for social norms to be utilized appropriately, the mediator must understand those norms well enough to identify their impact on the mediating parties.

### *C. Focus on Consumers (Disputants and Their Lawyers), Not Producers (Mediators)*

Over the past two decades, mediation has undergone dramatic growth. While the market for ADR has grown generally, use of mediation seems to

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<sup>58</sup> According to Bernstein, tightly knit commercial collectives have already utilized binding arbitration in this way. See Bernstein, *Cotton Industry*, *supra* note 28, at 1732 (noting that, although the cotton industry's "[t]rading [r]ules would be enforceable under the [Uniform Commercial] Code if included in a contract, they nonetheless differ from the Code in fundamental ways"); Bernstein, *Diamond Industry*, *supra* note 28, at 149 (explaining that because diamond arbitrators "possess industry expertise" and "are permitted to consider information that would be excluded in court under the rules of evidence," some kinds of disputes typically result in verdicts that are "more accurate and predictable than those of a court"). Under appropriate conditions, the maintenance and evolution of extra-legal industry norms can operate via the mediation market as well. All that is required is reciprocal cooperation among "repeat-players" (typically, but not necessarily, through contract), appropriate signaling by mediators (via advertising, credentialing, etc.), and a generally "hands-off" approach by judges who must decide whether to enforce these commitments. For a discussion that such a movement within the mediation market is already underway, see Bush, *supra* note 29, at 127–31 and Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 937–49 (2002).

<sup>59</sup> See, e.g., April Mara Major, *Norm Origin and Development in Cyberspace: Models of Cybernorm Evolution*, 78 WASH. U. L.Q. 59, 75–95 (2000); Strahilevitz, *supra* note 10, at 361–65.

<sup>60</sup> Generally, the larger and more anonymous a social group, the more incentives there are for members to opportunistically violate social norms.

<sup>61</sup> See Bush, *supra* note 29, at 118–24. But see *id.* at 128–31.

<sup>62</sup> *Id.* at 128–30.

have outpaced the use for other forms of ADR such as arbitration.<sup>63</sup> Despite its expansion, mediation has yet to produce a fully coherent theoretical framework to explain how mediator intervention benefits the disputing parties.<sup>64</sup> Most theories of mediation place considerable attention on the role of the mediator.<sup>65</sup> Generally, theories of mediation attribute considerable importance to the mediator's style or approach. Perhaps this is because the mediator is the one party over whom scholars and educators feel they have any influence.

It is time to consider whether this traditional focus on the mediator is a flawed approach. Such a focus is unhelpful for understanding the shift towards predictive settlement, and perhaps even for improving mediation quality generally. The social norm model proposed here focuses instead on the cognitive framework that *the parties* use to identify and evaluate their interests. If market forces are driving the trend towards predictive settlement, then scholars should look to mediation's *consumers*—not its ostensible suppliers—to understand this shift.<sup>66</sup>

The value parties place on information is key. The greater the parties' investment in obtaining a strictly legal analysis of their dispute, the less likely they are to capture mediation's unique, extra-legal benefits. Very simply, parties who have invested considerable time, effort, or money in ascertaining a legal opinion of their dispute will generally seek to capitalize on that information. They will tend to ignore their non-legal interests, and eschew resolutions that do not conform to perceived legal outcomes. They will likely wonder about any mediator who wishes to direct them towards larger issues, and will gravitate instead towards mediators who try to predict legal outcomes and offer "realistic" numbers.

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<sup>63</sup> See Thomas R. Donahue & Barbara C. Deinhardt, *Survey: ADR Use Increasing*, 15 ALTERNATIVES TO HIGH COST LITIG. 66 (1997) (stating that of the corporations surveyed, 87% report using mediation over a three-year period compared to 78% using arbitration over the same period); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 140–41 (1996).

<sup>64</sup> For a discussion, see Dorothy Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 39–65 (2002). The authors concede that "mediation practice has developed, largely in the absence of articulated, scholarly, theoretical frameworks explaining mediation as a distinct social process . . ." *Id.* at 42.

<sup>65</sup> An indication that this focus is misplaced is suggested by GOLDBERG ET AL., *supra* note 26, at 161. "Of the measured traits of mediators, only experience (having mediated more than 15 cases) even approach[es] a statistically significant relationship with settlement." *Id.*

<sup>66</sup> See Bush, *supra* note 29, at 118–24. *But see id.* at 128–31.

Contrary to various ideologies, the mediator's role is actually pretty sparse. As professional neutrals, mediators tend to adjust their practices to reflect the desires of the parties. Most are trained to help resolve disputes according to the *interests* of the disputing parties.<sup>67</sup> Typically, as interest-based bargaining replaces the haggler's dickering over margins, opportunities for mutual gain are increased.<sup>68</sup> Mediators learn that, in order to understand parties' interests, they should focus on the parties' personal goals and aspirations. However, a problem arises. Once a party has invested in a strictly legal analysis of their dispute, often their personal goal and aspiration is, very simply, to "win." That party's perception of the dispute becomes adapted to the adversarial, zero-sum approach of formal adjudication.<sup>69</sup> Such perceptions are likely to be exacerbated by contact with attorneys whose "philosophical maps" are oriented towards the adversarial<sup>70</sup> as epitomized by the professional ideal of zealous advocacy.<sup>71</sup>

It is difficult to estimate just how costly the lawyer's "adversarial orientation" is for clients. But a recent study of six in-house and major corporate counsels indicates that lawyers' attitudes considerably impact the quality of mediation, as defined by real costs to their respective corporate clients.<sup>72</sup> This should come as no surprise, since most often it is lawyers, not disputants or mediators, who are the proximate gatekeepers to mediation.

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<sup>67</sup> Kathy Kirk, *Mediation Training: What's the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637, 645–48, 650 (1998). Kirk endorses the view that "mediation is neither a science nor pure instinct, but a teachable set of skills." *Id.* at 650. According to her, the most important feature of mediation training is the promulgation of the concept of interest-based bargaining. The wholesale application of interest-based negotiation theory to mediation has not been without critics, however. See Della Noce et al., *supra* note 64, at 44–45.

<sup>68</sup> FISHER & URY, *supra* note 49, at 40–55. Interest-based bargaining entails parties exploring each other's interests rather than merely taking a hard bargaining position over some single quantifiable factor (e.g., land, money, "the pie"). By using this approach, parties are more likely to turn their dispute into a collaborative effort for achieving mutual gain, or "win-win" results.

<sup>69</sup> Jonathan M. Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. REV. 863, 863–76 (1987) (analyzing various traits of litigating attorneys that conflict with facets of fruitful negotiations); Menkel-Meadow, *supra* note 52, at 2–3, 17.

<sup>70</sup> Guthrie, *supra* note 46, at 160–64 (citing empirical research that suggests lawyers are "disproportionately oriented to an adversarial worldview").

<sup>71</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002).

<sup>72</sup> Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 839–47 & n.46 (1998); see also *infra* note 76 and accompanying text.

The study suggests that changing attorneys' attitudes towards mediation, especially their sense of *when* to mediate, might go a long way toward improving the quality of mediated settlements.

The research focused on large corporate consumers of mediation. Of the six corporate counsels studied, five were signatories to the corporate pledge of the Center for Public Resources' Institute for Dispute Resolution (CPR).<sup>73</sup> The researchers found that, despite this professed commitment to ADR, only two of the corporations used mediation with enough frequency (30% and 40% of the time, respectively) to enjoy substantial cost-reduction benefits.<sup>74</sup> And, of these two, only one<sup>75</sup> used it early enough to preempt discovery proceedings—arguably the main culprit of the “transaction costs” that predictive settlement theories seek to reduce.<sup>76</sup> This company settled its business-to-business cases an average of ten months earlier<sup>77</sup> and reported the strongest levels of partnership between attorneys and business executives.<sup>78</sup>

The suggestion that mediated settlement negotiations should occur *before* discovery is contrary to many lawyers' professional practice.<sup>79</sup> So entrenched is the lawyer's interest in having all the facts that it may be described with

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<sup>73</sup> *Id.* at 841. For a complete list of signatories to the CPR pledge, see CPR CORPORATE POLICY STATEMENT ON ALTERNATIVES TO LITIGATION REGISTRY OF SUBSCRIBERS (CPR Institute for Dispute Resolution, 2003), *available at* <http://dyn.cpradr.org/corppldg.asp> (last visited February 14, 2005).

<sup>74</sup> Rogers & McEwen, *supra* note 72, at 840 & 843 n.71 and accompanying text; *see also* John Lande, *Relationships Drive Support for Mediation*, 15 ALTERNATIVES TO HIGH COST LITIG. 95, 96–97 (1997) (arguing that time and costs are interwoven issues of outcome quality).

<sup>75</sup> *See* Rogers & McEwen, *supra* note 72, at 842. This most expert consumer of mediation was the Motorola Corporation. Interview with Nancy H. Rogers, study co-author, in Columbus, Ohio (Mar. 1, 2004); *see also supra* note 49.

<sup>76</sup> *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 508–523 (2000); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, n.76 (1996); *see also* INTERIM REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH JUDICIAL CIRCUIT, 143 F.R.D. 371, 387 (1991) (Many lawyers and judges believe that discovery is increasingly used “as a weapon rather than as an information gathering mechanism.”).

<sup>77</sup> Rogers & McEwen, *supra* note 72, at 843 n.71 and accompanying text.

<sup>78</sup> *Id.* at 844–45.

<sup>79</sup> Jack M. Sabatino, *ADR as “Litigation Lite”: Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1311–12 (1998) (noting that in both the Federal and state courts, discovery is not ordinarily stayed when a case is diverted from the trial docket to mediation).

some certainty as a social norm unto itself.<sup>80</sup> Like most social norms, it has proved virtually adamant for reformers.<sup>81</sup> Yet, for those willing to risk bucking trends, a policy of mediating early can bring major advantages.

This early research suggests that the willingness to negotiate early, with levels of information that other counsel would deem inadequate,<sup>82</sup> resulted in positive snowball effects for that corporation. Three benefits in particular stand out. First, this company settled disputes an average of ten months earlier than the four corporations who used mediation least frequently, and eight months earlier than the next largest consumer of mediation.<sup>83</sup> Second, lawyers in this company reported that they found mediation a positive alternative to formal discovery.<sup>84</sup> Third, these counsel favored client attendance at mediation in 60% of their cases (compared to 27% elsewhere).<sup>85</sup> Each of these practices contributed to better mediation outcomes for the company, measured not only in cost savings, but also in better business relationships. Yet each decreased the availability of legal information, forcing disputants' to rely less on *that kind* of information and more on other kinds. Might there be a connection between these two factors? Could it be that attorneys' openness to mediating without complete legal information—and even going so far as to bring their clients to settlement negotiations—could result in benefits for a major corporate client?

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<sup>80</sup> Cooter, *supra* note 2, at 1647. Professionals like lawyers and accountants frequently self-regulate according to profession-wide norms.

<sup>81</sup> Rogers & McEwen, *supra* note 72, at 842. One attorney interviewee told researchers that “the use of discovery will never diminish because it’s tradition.” Another (general counsel to the 40% company) reported that he finally got the legal department to consider mediation by instituting a protocol that made it prohibitively difficult for staff to proceed with formal discovery. *Id.* at 843. To initiate discovery, attorneys would have to fill out an internal request that was “like an IRS form” in size and complexity. *Id.*; Interview with Nancy H. Rogers, *supra* note 75.

<sup>82</sup> Rogers & McEwen, *supra* note 72, at 843. This company’s general counsel told researchers that “[a]ttorneys want 100 percent of the information before advising settlement. CEOs make decisions involving as much money based on [only] 30 percent of the information.” To that end, he recommended lawyers putting themselves on “a diet concerning our information needs.”

<sup>83</sup> *Id.* at 843 & n.71.

<sup>84</sup> *Id.* at 843.

<sup>85</sup> *Id.* at 844.

*D. Kinds of Interests—What Instrumentalism Overlooks*

One explanation for why early negotiation improves settlement outcomes focuses entirely on savings in transaction costs.<sup>86</sup> An indication that this appraisal may be unduly restrictive is its inability to account for the choices made by lawyers who mediate early. The corporate survey found that such lawyers enthusiastically “[emphasize] in place of formal discovery both informal investigation and the exchange of information that can occur as part of the mediation process.”<sup>87</sup> Furthermore, these lawyers’ increased willingness to bring clients to negotiations indicates their belief that their clients’ non-legal (normative) frameworks actually add value to the process—a belief that the predictive settlement model simply cannot account for.<sup>88</sup>

A more provocative view is that, once placed on a restrictive “diet” of legal information, lawyers’ adversarial framework declines, permitting other interests to frame the negotiation. To borrow the language of principled negotiation, parties recognize that the “objective criteria”<sup>89</sup> used to meaningfully evaluate their dispute need not be limited to legal rules. Informal sharing of information may sometimes be more pertinent to settlement negotiations than “turning over every rock” to find the ideal legal theory.<sup>90</sup>

Expert consumers of mediation recognize that the parties’ interests frequently include a broader consideration of the social consequences of their dispute.<sup>91</sup> Generally, the personal implicates the social, and vice versa.

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<sup>86</sup> See, e.g., Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12 *STUD. IN L. POL. & SOC’Y* 367, 369 (1992) (The primary effect of ADR devices is to “promote relatively quick settlements so that the costs of discovery are limited.”).

<sup>87</sup> Rogers & McEwen, *supra* note 72, at 843.

<sup>88</sup> After all, if informational asymmetries about legal outcome are the sole deterrents to settlement, the presence of non-expert clients will not likely improve the negotiations.

<sup>89</sup> FISHER & URY, *supra* note 49, at 81–92. The authors list a variety of bases on which to form “objective criteria” including legal precedent, but also market value, scientific judgment, efficiency, moral standards, tradition, and reciprocity. *Id.* at 85. The authors implicitly recognize that disputes with legal consequences may nevertheless be analyzed according to non-legal objective criteria.

<sup>90</sup> See Weise, *supra* note 48.

<sup>91</sup> FISHER & URY, *supra* note 49, at 46–48. Fisher and Ury recommend that bargaining parties create a “checklist of consequences” to help them identify their interests. *Id.* at 46. Of primary consequence is the impact on the bargaining party’s own personal interests. However, bargaining decisions also reflect an “[i]mpact on the group’s interests.” *Id.* at 47. Bargaining parties ignore these broader, social interests at their peril.



Mediators can gain a better appreciation of mediation's social consequences by considering them analytically.<sup>92</sup> Greater awareness of how social forces interact with individuals' personal interests will afford mediators more opportunities to recognize—and even to inform<sup>93</sup>—the parties' perceptions of their own interests. The theory of social norms provides a useful tool for understanding why parties rely on socially accepted standards of fairness and efficiency when bargaining.

When parties settle disputes in mediation, legal interpretations of their behavior are liable to be less meaningful than they would be in a formal adjudication.<sup>94</sup> Parties will typically rely on other objective criteria to evaluate their interests. As the importance of legal norms recedes, parties to mediation are increasingly likely to evaluate their own interests, as well as the other parties' interests, according to social norms. By limiting formal discovery and by bringing clients to mediation, bargainers increase the relevance of extra-legal "frames."<sup>95</sup>

While mediation scholars idealistically emphasize the parties having the individual autonomy to make their own bargaining choices, people typically

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The theory developed in this Note is that the social consequences of a mediated settlement considerably impact the parties' "personal" interests. Fisher and Ury recognized this interaction between the personal and the social. Tellingly, in their chosen example, the personal interests of the bargainer ("Will I lose or gain political support?"; "Will colleagues criticize or praise me?") implicate social consequences of their bargaining choices. *Id.*

<sup>92</sup> This treatment conforms to the recommendations by Fisher and Ury: "The more you bring standards of fairness, efficiency, or scientific merit to bear on your particular problem, the more likely you are to produce a final package that is wise and fair." *Id.* at 83.

<sup>93</sup> See Waldman, *supra* note 27, at 723–42 (discussing a "norm-educating model" of mediation in which the mediator informs parties about applicable social (and legal) norms, but does not challenge parties who choose to deviate from these norms by mutual, informed agreement).

<sup>94</sup> As one of John Lande's interviewees (an inside counsel) reported:

[Trying ADR] just makes a heck of a lot more sense. If you can resolve it face to face, sitting down just talking, businesspeople to businesspeople, you don't even have to have lawyers in the room . . . I mean it's somebody to make people think about the consequences before they charge off the cliff . . . You don't have all those legal fees. And you probably come out with a better answer anyway. Litigated answers usually aren't very good.

Lande, *supra* note 19, at 185 (alteration in original).

<sup>95</sup> FISHER & URY, *supra* note 49, at 88. Issues should be framed as a "joint search for objective criteria" with parties remaining "open to reason as to which standards are the most appropriate." *Id.* This implies that a strictly legal frame, while relevant, need not preclude other "frames" that the parties might wish to emphasize.

look for assurance that their interests conform to socially sanctioned behavior. The fact that individual choices frequently adhere to perceived social norms partly explains the mutual support for ADR by both "neo-liberal" defenders of individual autonomy as well as by those who endorse a "communitarian" ethos of facilitation.<sup>96</sup>

The cognitive tools that parties use to evaluate their interests are likely to encompass each of the following:

- (1) **Legal norms**, which are related to the parties' expectations of a disputes' outcome at trial.
- (2) **Social norms**, which are related to the parties' expectations of the social sanctions they may incur or avoid depending on whether the mediation is successful or abortive.<sup>97</sup>
- (3) **Personal interests**, which are related to parties' own perceptions of their autonomous preferences and needs.

These categories are not discrete.<sup>98</sup> For example, there may be considerable overlap between the legal and social consequences of an abortive mediation. The person who has reason to fear the legal repercussions of going to court may be equally mindful of possible long-term costs to his reputation. Likewise, the bargainer who hopes to repair a business relationship by successful mediation may have considerable personal interests at stake. The divorcé who wants to amicably dissolve a marriage may be acting in accordance with the social expectations of an extended family that punishes nonconformity to its values with gossip and ostracism. Sometimes, the personal interest is nothing more than a desire for

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<sup>96</sup> Leon E. Trakman, *Commentary: Appropriate Conflict Management*, 2001 WIS. L. REV. 919, 920–22 (2001). Trakman defines ADR as appropriate conflict management. According to Trakman, "Conflict management is grounded in competing philosophies." *Id.* at 920. But while these philosophies may evidence ideological disagreement, "[i]ndividuated and communitarian methods of conflict management often co-exist." *Id.* at 921. Furthermore, "A viable philosophical conception of ADR ordinarily engages both liberal and communitarian ends." *Id.* at 922.

<sup>97</sup> "Social norms" and "personal interests" frequently overlap. As Trakman has pointed out, social values may be divided between two sets. The first set encompasses values that the individual voluntarily subscribes to, while the other set includes all of the values that others attribute to them and to which they expect or require conformity. *Id.* at 922.

<sup>98</sup> *Id.* at 924–25. Communal values and individual ends encompass a range, and are "mutually supportable." A bargainer may be part of an industry that values "profit maximization" in which case that party will have a personal interest in maintaining low transaction costs. *Id.* at 925. Vice versa, an "[i]ndividual interest in vengeance, an apology, or compensation are all sustainable under communal conceptions of social justice." *Id.*

the other party to recognize the legitimacy of a social norm—for example, by making apologies.<sup>99</sup>

### III. SOCIAL NORMS IN ACTION: FROM THE LAW MERCHANT TO THE MEDIATION OF CONSTRUCTION CLAIMS

The history of commercial law may be viewed as a continuous series of thrusts and parries between the business community and the state, each pursuing a timeless search for equilibrium between centralized regulation and decentralized self-ordering.<sup>100</sup> Over the course of this history, instances of

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<sup>99</sup> See Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1136 (2002) (treating apology as means to signal recognition of shared social norms); see also Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1016, 1020–21 (1999) (defining apology as a “commodity” on which the wrongdoer holds a monopoly, and arguing that such a holder may trade for tangible value in certain settlement negotiations); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 857–58 (2003) (specifying mediation as the most likely forum in which disputants can effectively utilize the apology). According to O'Hara and Yarn:

Identification of the wrongful act, remorse, and promise to forbear are elements that confirm the validity of a norm shared by the victim and transgressor. Through a clear expression of these elements, the transgressor displays recognition of the norm violated and acceptance of the mutuality of that norm. . . . Conversely, if interacting parties have failed to establish shared social norms prior to an alleged transgression, the apology can be delayed pending discussion of appropriate standards of conduct.

O'Hara & Yarn, *supra*, at 1136 (emphasis added).

<sup>100</sup> See BRUCE L. BENSON, *THE ENTERPRISE OF LAW, JUSTICE WITHOUT THE STATE* 43–83 (1991) (discussing the history of law as the increased centralization of “authoritarian law”). For a general history of the relationship between governments and markets in the 20th Century, see DANIEL YERGIN, *THE COMMANDING HEIGHTS* (1998). According to Yergin, trends since the end of the Cold War indicate greater deregulation of markets. *Id.* at 266–399; see also Charles Hansen, *The ALI Corporate Governance Project: The Duty to Care and the Business Judgment Rule, a Commentary*, 41 BUS. LAW. 1237, 1238–42 (1986) (“The foundation stone of the American law of corporate governance” is the business judgment rule, which holds that “there must be a minimum of interference by the courts in internal corporate affairs.”). But see Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 104–112 (2000) (arguing that the 20th century witnessed a monumental growth in regulation by governments as indicated by increases in the number of public laws, court suits, legal professionals, public-sector employment, and land-use regulations); Symposium, *International Accounting Standards in the Wake of Enron*, 28 N.C. J. INT'L L. & COM. REG. 725, 935 (2003). This symposium generally indicated that centralized regulation is once again expanding in the U.S. and abroad, as exemplified by the recent passage of the Sarbanes-Oxley legislation. Recent changes may

private dispute resolution have played a central role, appearing, disappearing, and reappearing sporadically. Forums for private self-regulation have frequently risked strain with the official courts<sup>101</sup> and have faced public concerns over risks of opportunism<sup>102</sup> and the inadequacies of private resolutions.<sup>103</sup>

Nevertheless, parties that interact long enough frequently establish their own social norms, as well as self-help measures designed to enforce those norms. Even when those relationships are sealed by formal contract (as in a business relationship), the parties rarely make explicit all relevant social norms. There are simply too many contingencies to anticipate all the potential defections by which each party might appropriate value from the other.<sup>104</sup> When public courts must adjudicate alleged breaches, they frequently do so at considerable distance from the parties' actual business environment.<sup>105</sup> What is more, the parties will each tend to overstate whatever information will most likely yield its preferred legal outcome.

This section compares two discrete episodes of this history, stretching from the very beginnings of the common law to the law's evolving present. First, an outline of the medieval Law Merchant (*lex mercatoria*) is offered. Operating initially within quasi-private tribunals known as piepowder,<sup>106</sup> this

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be signaling a new era of increased regulatory standards by states over corporations, and the accounting and legal professions that serve them. Participants debated the welcomeness of these changes and their implications. Symposium, *supra*, at 935

<sup>101</sup> MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at 145–49 (1977). In the early nineteenth century, American merchants relied on private arbitration and resisted legal centralization. That merchant disputes ultimately came under the purview of centralized public institutions was mainly due to the efforts of an “increasingly organized and self-conscious legal profession.” *Id.* at 154; see also Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984); Eben Moglen, Note, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983).

<sup>102</sup> See Amitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179, 1188 (2003) (describing highly regulatory antitrust and consumer protection laws as correctives to “information asymmetries that make opportunistic behavior more likely”).

<sup>103</sup> See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984).

<sup>104</sup> See POSNER, *supra* note 7, at 152.

<sup>105</sup> Aviram has pointed out that courts are “usually the most distant from the norm violator” and therefore have “significant monitoring costs and costs of error.” Aviram, *supra* note 102, at 1188–89.

<sup>106</sup> While in later centuries the Courts of Chancery and even the King's Bench would also apply rules understood to constitute the Law Merchant (see W. MITCHELL, *THE LAW MERCHANT* 39 (1904)), the fair courts (piepowder) actually bear the closest

“natural law of merchants” governed commercial disputes from roughly the 12th through the 15th centuries, but was eventually superceded by the King’s Bench at the beginning of the 17th century.<sup>107</sup> Social norm theorists, as well as other advocates of customary law, frequently cite the Law Merchant as among the most distinctive and successful instances of private ordering in the history of British common law.<sup>108</sup> This admittedly archaic system is compared and contrasted to contemporary trends in the mediation of construction claims.

However dissimilar these forums may first appear, piepowder and construction ADR actually share several important features. Both suggest that self-ordering is optimal within groups whose members engage in reciprocal relationships and share common goals. Where disputants have such relationships, they will be more attuned to optimal social norms. In such instances, time constraints and informality may actually enrich outcomes, helping parties to focus less on procedure and more on reciprocal goals. Mediation forums that serve the needs of such groups will be more likely to produce fair and creative outcomes that deviate from adjudicative outcomes. Disputants within such forums will therefore be less likely to engage in predictive settlement.

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resemblance to contemporary ADR, and so for the purposes of this Note I focus on them in particular.

<sup>107</sup> See BENSON, *supra* note 100, at 60–61.

<sup>108</sup> *Id.* at 30. “Because the Law Merchant developed outside the constraints of political boundaries and escaped the influence of political rulers for [so long] . . . it provides the best example of what a system of customary law can achieve.” *Id.*; see also LEON TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 1–37 (1983); Charles A. Bane, *From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law*, 37 U. MIAMI L. REV. 351 (1983) (comparing the early history of the Law Merchant to the Uniform Commercial Code, which respects the social norms embodied by “customary practice,” “course of dealings,” and “usage of trade”); Cooter, *supra* note 2, at 1647–48 (describing adjudication that fosters awareness of and deference to social norms as “a new law merchant”). “Custom, not law, has been the fulcrum of commerce since the origins of exchange. From the earliest times, merchants have devised their own business practices and regulated their own conduct.” TRAKMAN, *supra*, at 7–8; see also WYNNDHAM ANSTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT* 19–24 (1923) (describing how the Law Merchant’s attention to custom produced substantive, and not simply procedural, differences between its outcomes and those of the common law courts).

For a game theoretical model of the piepowder courts, see Paul R. Milogram et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, in REPUTATION, *supra* note 4, at 243, 248–62 (suggesting that, even with imperfect communication between medieval merchants, ostracism could act as a powerful sanction and ensure “honest” merchant practice).

A. *The Courts of Piepowder: The Early Arbitration of Customary Mercantile Law*

In medieval Europe (including England), the growth of markets outstripped the powers of states to effectively monopolize regulation over commerce.<sup>109</sup> From roughly the 12th through the 15th centuries, a significant portion of British commerce was subject to quasi-private regulation.<sup>110</sup> Over the course of these several centuries, commercial law developed at a distance from the powers of the state,<sup>111</sup> regulated by mechanisms operating mainly within the market.<sup>112</sup>

The remarkable feature of this history is that the very merchants most affected by this law oversaw the arena in which it was administered.<sup>113</sup>

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<sup>109</sup> MITCHELL, *supra* note 106, at 39. According to Mitchell, centralized jurisdiction over commercial matters was “a late development, for it was but slowly that the central authority became powerful enough to enforce a uniform system” of commercial law. Even after centralization, the sovereign “did always see the necessity of establishing separate courts of commerce.” *Id.* at 40. For an excellent history of the rapid growth of fair economies across Europe and the British lowlands, see 2 FERNAND BRAUDEL, *CIVILIZATION AND CAPITALISM 15TH–18TH C.: THE WHEELS OF COMMERCE* 25–137 (Sian Reynolds trans., 1992).

<sup>110</sup> It would be an overstep to suppose that the Law Merchant was entirely private justice. Even the temporary piepowder courts required the king’s approval. Officially at least, these courts’ jurisdictions depended on royal franchise no less than common law courts. *But see* Bane, *supra* note 108, at 353. Although royal franchise officially determined local authority to hold a fair and its court, and the “mayor or bailiff of the borough” might (or might not) be involved in the court’s administration, “proceedings were . . . highly informal, probably resembling more a street corner argument than a modern trial.” *Id.*

<sup>111</sup> THOMAS EDWARD SCRUTTON, *ELEMENTS OF MERCANTILE LAW* 4 (1891). According to Scrutton, “[i]f you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable.” Scrutton notes that the explanation for this remarkable absence is that piepowder (as well as other forums relying on admiralty and merchant law) siphoned commercial disputes away from the King’s Bench. *Id.*; *see also* 5 W.S. HOLDSWORTH, *HOLDSWORTH’S HISTORY OF ENGLISH LAW: THE COMMON LAW AND ITS RIVALS* 105–06 (1927) (“It is therefore to the piepowder courts . . . rather than to the courts of the boroughs, that we must look, if we would trace the development of the commercial law in England.”). For a recent account of the competition between medieval courts, see Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1582–89 (2003).

<sup>112</sup> Milogram et al., *supra* note 108, at 262.

<sup>113</sup> *See* W.E. LUNT, *HISTORY OF ENGLAND* 184 (1957). The judgment of the court was “often found by a group of the merchants attending the fair, who were likely to be

Adjudication of commercial disputes frequently occurred at the courts of the fair (commonly known as piepowder). These forums “summon[ed] merchants to testify about their customs”<sup>114</sup> and even relied on neutral merchants to decide which evolving customs should be given deference.<sup>115</sup> In effect, the laws of the fair were the merchants’ own evolving social norms. Although granted powers of summary execution,<sup>116</sup> the decisions of these courts were enforced largely on the basis of reputation and control of access to the market.<sup>117</sup> Merchants who failed to comply with the orders of the piepowder essentially lost their license to operate at the market.

A 13th-century English handbook on commercial law begins: “Mercantile law [*lex mercatoria*] is thought to come from the market, and thus we first need to know where *markets* are held *from which such laws derive*.”<sup>118</sup> For commentators of the medieval period, merchant practice constituted a “natural law of merchants.” Courts applying the Law Merchant took a unique interest in the actual customs of the disputants appearing before them.<sup>119</sup>

Historical appreciation of the Law Merchant requires at least a cursory look at how medieval traders conducted commerce. During this medieval

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guided by a body of commercial laws and customs which the merchants . . . had developed by their own usage to meet their particular needs.” *Id.*

<sup>114</sup> MICHAEL E. TIGAR, *LAW AND THE RISE OF CAPITALISM* 56 (2d ed. 2000); *see also* HOLDSWORTH, *supra* note 111, at 107, n.5 and accompanying text.

<sup>115</sup> *See* MITCHELL, *supra* note 106, at 55, 61, 69, 173–74; *see also* 22 SELDEN SOCIETY, *SELECT CASES CONCERNING THE LAW MERCHANT* I, at xxv (1908).

<sup>116</sup> BEWES, *supra* note 108, at 87.

<sup>117</sup> *See* Milogram et al., *supra* note 108, at 243, 247, 263; BENSON, *supra* note 100, at 33 (“Merchant court decisions were backed by threat of ostracism.”).

<sup>118</sup> *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH CENTURY TREATISE AND ITS AFTERLIFE* 1 (Mary Elizabeth Basile et al. trans. & eds., 1998) (emphasis added). The translation of the complete handbook (originally titled *Lex Mercatoria*) and often referred to by Holdsworth and others as “The Little Red Book of Bristol,” is included at the back of the volume and is individually paginated. That the procedure of the fair courts was understood to be different from that of the common law is expressed in the second chapter of the handbook. Although the Law Merchant shared with medieval common law certain technical pleadings based on “writs” and “pledges,” the author of “The Little Red Book” notes that “[t]he law of the market differs from the common law of the kingdom . . . [in that] it generally delivers itself [of a judgment] more quickly.” *Id.* at 2. According to Trakman, “[o]ral proceedings, informal testimony of witnesses and unwritten judicial decisionmaking were all essential ingredients” that distinguished the Law Merchant from medieval common law. *See* TRAKMAN, *supra* note 108, at 13.

<sup>119</sup> Bewes emphasizes that “the courts enforced the custom of the merchants.” BEWES, *supra* note 108, at 19; *see also* TRAKMAN, *supra* note 108, at 18.

period the focal points of commerce were the fairs dotting continental Europe and the British lowlands.<sup>120</sup> Mobile caravans of traders would station at regular intervals near a population of agrarian consumers.<sup>121</sup> In England, such fairs typically occupied the property of some well-to-do gentry (a lord or bishop, for example) to whom the king had granted franchise, and who secured a monopoly on rents.<sup>122</sup> There, traders would construct temporary tents or booths. Trading would continue for several weeks, after which the entire project would move on, thus creating a continuous circuit.<sup>123</sup>

The fairs helped develop early international commerce. Since traders at fairs could avoid the restrictions on foreign competition imposed by town guilds, the fairs' expansion strengthened the connection between distant points of the European economy.<sup>124</sup> These fairs also fueled widespread speculation.<sup>125</sup> On the continent, especially at Champaign and Brie (the two largest such fairs) historians have located the early origins of international credit, bills of exchange,<sup>126</sup> and other innovations in negotiable instruments.<sup>127</sup> Although smaller, the English fairs at London and

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<sup>120</sup> 3 FERNAND BRAUDEL, *CIVILIZATION AND CAPITALISM 15TH-18TH C.: THE PERSPECTIVE OF THE WORLD* 111-12 (Sian Reynolds trans., 1992). Braudel and other historians sometimes refer to all fairs as "Champaign fairs" after the site of Europe's largest. *See also* TRAKMAN, *supra* note 108, at 19 (Champaign allowed the innovation and blending of "distinctive usages and customs").

<sup>121</sup> 3 BRAUDEL, *supra* note 120, at 111.

<sup>122</sup> LUNT, *supra* note 113, at 183.

<sup>123</sup> 3 BRAUDEL, *supra* note 120, at 111.

<sup>124</sup> The Law Merchant has been called "the private international law of the Middle Ages." MITCHELL, *supra* note 106, at 1; *see also* TRAKMAN, *supra* note 108, at 8. Insofar as merchant courts emphasized the dependability of customary practice, the Law Merchant could be described as having a "cosmopolitan" flair, since it was derived no less from the customs of Italian financiers, Flemish manufacturers, and German exporters than from English law and practice. According to Holdsworth, when dealing with foreigners, the commercial courts sometimes allowed the practice of forming "a jury of half-native half-foreign" and "[s]pecial rules were made where one of the parties to a suit wished to rely upon a document which . . . was in a foreign country." 5 HOLDSWORTH, *supra* note 111, at 104. Zywicki notes that the origins of the Law Merchant in the "city-states of Italy" led to its "fortuitous . . . cross-fertilization with Canon law." Zywicki, *supra* note 111, at 1593-94. It was "fortuitous" because it afforded the Law Merchant a "universalizing" quality, as well as a preoccupation with matters of equity. *Id.* at 1594.

<sup>125</sup> 3 BRAUDEL, *supra* note 120, at 112.

<sup>126</sup> Bane, *supra* note 108, at 354-55; *see also* 5 HOLDSWORTH, *supra* note 111, at 96-97.

<sup>127</sup> 3 BRAUDEL, *supra* note 120, at 112; *see also* BENSON, *supra* note 100, at 34-35.



Winchester, as well as St. Ives, Northampton, and Stamford, also linked British merchants with wholesalers on the continent.<sup>128</sup>

The increasing complexity of trade inevitably resulted in disputes among merchants, as well as between merchants and purchasers. Some adjudicative authority was required to settle such matters as they arose. The merchants demanded, however, that the resolution of such disputes meet two requirements. First, given the temporary existence of the fair at any one station, the process had to be swift and its justice prompt because the era's lengthy and complex judicial pleadings were not feasible given the transitory stays of the itinerate traders.<sup>129</sup> Second, its standards could not be that of the local borough or shire, an ostensibly alien and frequently protectionist justice to which it made little sense for itinerate merchants to conform.<sup>130</sup> Rather, its "law" had to suit the customs of the merchants operating the fair. The courts of piepowder originated from the satisfaction of these dual requirements. Their name is a corruption of the medieval French *pied poudr *, or "dirty feet." The precise etiology of the word is debatable,<sup>131</sup> but its application to a merchant court surely implied its rough, informal character.

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<sup>128</sup> LUNT, *supra* note 113, at 183. *But see* 5 HOLDSWORTH, *supra* note 111, at 113. For a useful map of the towns connected to the Champaign Fairs of the 12th and 13th centuries, see 3 BRAUDEL, *supra* note 120, at 113.

<sup>129</sup> Holdsworth notes that complicated medieval pleading devices were sharply abridged in "all medi val commercial courts throughout Europe." *See* 5 HOLDSWORTH, *supra* note 111, at 106. "Pleas were begun without writ, formalities were assuaged, few essoins were allowed, and an answer to the summons was expected within a day, often indeed within an hour." *See id.* (citing GROSS, SELECT CASES ON THE LAW MERCHANT (Date unknown)).

<sup>130</sup> The Crown recognized foreign traders as necessary components of capital growth, and generally protected their interests. In essence, the fairs were treated as "free trade" zones. In 1353, the Statute of the Staple was passed. Among its achievements, it codified certain protections afforded to foreign merchants who traded in staple goods (e.g., wool and leather). Although the courts of Staple "were expressly instructed to apply the law merchant and commercial custom and not the common law," foreigners charged there could appeal to the King's Bench decisions made under the Law Merchant. Zywicki, *supra* note 111, at 1598. Benson has argued that this innovation, ostensibly aimed at protecting international trade, was an early step towards the common law's eventual complete authority over commercial affairs, and the end of the piepowder system. *See* BENSON, *supra* note 100, at 60-61; *cf.* 5 HOLDSWORTH, *supra* note 111, at 116.

<sup>131</sup> *See* LUNT, *supra* note 113, at 183 (describing the word piepowder as "signifying that the court was so informal that traders . . . could come into the Court just as they were."); *cf.* Bane, *supra* note 108, at 353 (describing the same word as "referring to the shoes of the itinerant merchants who traded goods at the fairs").

To us moderns, informality is certainly piepowder's most distinctive feature. For example, disputes might be resolved in a tent or shack.<sup>132</sup> This informality hastened administration; the speed at which the courts of piepowder settled disputes has no modern equivalent.<sup>133</sup> Certain facts indicate the degree to which merchants wished to safeguard this feature of the courts. Most telling perhaps is that lawyers—viewed with suspicion as purveyors of the tediously formal—were generally denied entrance to the piepowder courts.<sup>134</sup> Since their jurisdiction depended on the consensus of the parties in dispute,<sup>135</sup> the piepowder courts were able to decide matters otherwise unjusticiable at early common law.<sup>136</sup>

A skeptic might suppose that control by merchants of their own legal regime might have led to protectionism and cartelization<sup>137</sup> among merchants, making itinerate merchants tend to uphold rules favoring sellers

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<sup>132</sup> See Bane, *supra* note 108, at 353.

<sup>133</sup> In a 1458 Colchester case, a creditor brought suit on a £60 debt at eight o'clock in the morning. The Court summoned the defendant (a fair attendee) once each hour from nine o'clock to noon. Since the debtor failed to appear, the court entered judgment against him by default. By four o'clock that afternoon, the plaintiff had attached the debtor's property and the matter was deemed decisively concluded. See 22 SELDEN SOCIETY, *supra* note 115, at 122–25.

<sup>134</sup> 5 HOLDSWORTH, *supra* note 111, at 96.

<sup>135</sup> By paying rents at the fair, merchants voluntarily accepted its jurisdiction. See 22 SELDEN SOCIETY, *supra* note 115, at xx–xxii; see also Milogram et al., *supra* note 108, at 247 (“Ostracism played an important role here, for merchants that failed to abide by the decisions of the judges would not be merchants for long.”).

<sup>136</sup> Bane, *supra* note 108, at 353–54. Piepowder courts enforced informal and oral agreements at a time when formalism prevented common-law courts from adjudicating anything but written contracts under seal. See also TRAKMAN, *supra* note 108, at 12–14. Contracts providing for the payment of interest—illegal and unenforceable at common law—were “lawfully charged . . . at fairs,” as was the interest on unpaid accounts. BEWES, *supra* note 108, at 23.

<sup>137</sup> A common criticism of private bargaining systems is that the rules produced will tend to favor the interests of “repeat-player” at the expense of “one-shot” disputants. See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 26–28 (1999); cf. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974). Few courts would seem in as imminent danger of that possibility as piepowder, since it was actually overseen to a large degree by the merchants themselves. Yet, insofar as the Law Merchant innovated rules protecting the equities of purchasers as well as sellers, and of foreigners as well as locals, this does not seem to have occurred. See TRAKMAN, *supra* note 108, at 9. “A utilitarian ideal in the form of maximal benefit to all—princes, merchants and consumers alike—offered the Law Merchant its most solid foundation.” *Id.*

at the expense of purchasers, or natives over foreigners, for example. What evidence is available seems to contradict that hypothesis, however. By medieval standards, piepowder had a reputation not only for speed, but also for fairness. The protection of bona fide purchasers originated with the Law Merchant,<sup>138</sup> as did certain equitable defenses to contract including mistake, fraud, and duress.<sup>139</sup> It innovated warranties of quality,<sup>140</sup> as well as distinctive theories of agency that are still enforced today.<sup>141</sup> Within piepowder, married women who were traders could enforce contracts—a novelty disallowed at common law.<sup>142</sup> Procedural devices offered foreign traders protection from local cartels.<sup>143</sup> The piepowder courts also adopted the custom of Muslim traders that “gross inadequacy of price involves the inference of deceptions.”<sup>144</sup> Piepowder did not merely reduce disputants’ transaction costs. By limiting medieval pleading requirements and relying on merchant customs, it also contributed substantively to legal decisionmaking. Many of these contributions were later incorporated into the common law. Piepowder’s presence as a legitimate “competitor” to the official legal system effectively provided supply-side market pressures for the widespread adoption of efficient legal rules.<sup>145</sup>

The history of piepowder, which this Note has merely outlined, merits serious attention by the ADR community. It provides an early example of a decentralized forum, improving distributions of value within a social network precisely because it adopted the social norms of the community it regulated. It also indicates that such decentralization can serve the broader interest of justice. During crucial periods of growth and transformation for the European economy, the Law Merchant helped to develop the moral authority of the law by resolving disputes flexibly, and in accordance with emerging customs.<sup>146</sup>

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<sup>138</sup> DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 129 (1990).

<sup>139</sup> Zywicki, *supra* note 111, at 1594.

<sup>140</sup> *Id.* at 1599; 5 HOLDSWORTH, *supra* note 111, at 110.

<sup>141</sup> 5 HOLDSWORTH, *supra* note 111, at 110–11.

<sup>142</sup> *Id.* at 104.

<sup>143</sup> See *supra* note 125.

<sup>144</sup> BEWES, *supra* note 108, at 24.

<sup>145</sup> Zywicki, *supra* note 111, at 1622. The “presence of competition among legal systems forced courts to provide laws conducive to private ordering and . . . rooted in custom. The freedom of the parties to choose their law meant that law *had to conform to their preferences and expectations*.” *Id.* (emphasis added).

<sup>146</sup> Lon Fuller famously contrasted legal positivism with his concept of an internal morality of the law” based on reciprocity and expectations (social norms). LON FULLER, THE MORALITY OF LAW 24 (1964). He regarded the exchanges of “economic traders” as

By focusing on the actual practices of disputants (their social norms), rather than simply devising legal rules, piepowder ultimately served to evolve merchant practice. Lon Fuller's description of mediation therefore applies to piepowder as well, since it not only relied on existing social norms, but also furthered the "creation of the relevant norms themselves."<sup>147</sup>

This episode from the distant past also offers practical suggestions for how ADR fora ought to be crafted. It indicates, in a concrete way, what models of social norms merely suggest: that norm enforcement maintained within a discrete network (and with only minimal reliance on state enforcement) can distribute resources in optimal ways. Institutions that look beyond the scope of formal rules, and focus on the shared goals of their members, will more easily adapt social norms that uphold all interested parties' expectations of value. They will also be more capable of coalescing as an organic whole, as a project.

Besides harnessing the feeling of reciprocity that lies at the heart of all market transactions (the sense of a deal), piepowder facilitated the shared purpose of those who submitted to its jurisdiction, taking as its goal the organization of commerce within the fair. By focusing directly on this objective (generally shared by all fair attendees), it was able to balance the interests of sellers and purchasers, stewards and kings, foreigners and locals.<sup>148</sup>

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models on which to base the law's moral foundation. *Id.* at 19–24. He recognized that the "economics of exchange," on which all commercial law is based, require certain "fixed points" (broadly speaking, property and contract). *Id.* at 28. These fixtures must nevertheless be flexible enough to sustain evolving social conditions:

Without a self-sacrificing deference toward[s] [the institutions of property and contract], a regime of exchange would lose its anchorage and no one would occupy a sufficiently stable position to know what he had to offer or what he could count on receiving from another. On the other hand, the rigidities of property and contract must be held within their proper boundaries. If they reach beyond those boundaries, society's effort to direct its resources toward their most effective use is frustrated by a system of vested personal and institutional interests . . . a kind of property right reaching beyond its proper domain.

*Id.* at 28. At a time when emerging markets were unstable, and the formal laws of property and contract were rigid to the extreme, the Law Merchant effectively charted a middle course. It did this by acknowledging the necessity of economic institutions *and* by directing its management towards maximum economic efficiency, based on merchant custom. See Zywicki, *supra* note 111, at 1593–96.

<sup>147</sup> Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971).

<sup>148</sup> See TRAKMAN, *supra* note 108, at 9.

Although the piepowder courts share binding outcomes with contemporary arbitration,<sup>149</sup> their procedures suggest optimal conditions for decentralized recognition and enforcement of evolving social norms, an orientation that links it to mediation.<sup>150</sup> Where a social network is well demarcated, where timeliness necessitates that legal formalities give way to the careful assessment of custom and reciprocal needs, efficient social norms have the best chance to flourish.

### B. *The Construction Industry Embraces Mediation*

The specialized ADR procedures that have emerged in the construction industry over the past two decades share, to a remarkable degree, the methodology and goals of the medieval Law Merchant. Not only are architects, owners, contractors, and subcontractors locked into reciprocal relationships, but they are typically directed toward a common objective (the contracted project). Timeliness is essential when managing construction disputes. Procedures must be readily available so that parties can settle disputes quickly enough to avoid “downstream” losses. Within the construction industry, resorting to the courthouse, or even just involving lawyers, raises other parties’ suspicions that the instigator intends to defect from the project. As disputes arise, parties have incentives to maintain mutually profitable relationships, even with those whom they disagree. Under precisely these sorts of conditions, disputants will tend to rely on social norms and evolve these norms optimally.

The construction industry experiments with alternatives to litigation with special volatility.<sup>151</sup> As early as the vast canal projects of the 19th century, Anglo-American contractors have deferred to neutral experts (frequently, the

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<sup>149</sup> BEWES, *supra* note 108, at 87 (stating that piepowder courts possessed “rights of summary execution”).

<sup>150</sup> While binding arbitration merely affords a different conclusive outcome and other non-binding ADR (e.g., minitrial, summary jury trial, and early neutral evaluation) all tend to absorb the “logic” of predictive settlement, only mediation can produce an outcome based on the parties’ own perception of their extra-legal norms and interests. In this way, it actually has more potential to satisfy the parties’ conclusions about what should constitute the appropriate social norm.

<sup>151</sup> See Darrick M. Mix, Note, *ADR in the Construction Industry: Continuing the Development of a More Efficient Dispute Resolution Mechanism*, 12 OHIO ST. J. ON DISP. RESOL. 463, 464 (1997). Mix describes how experiments with arbitration in the 1960s and 1970s gave way to soaring litigation in the 1980s, followed by “renewed efforts to arbitrate disputes,” as well as novel interest in “new means of ADR . . . available to resolve disputes.” *Id.*

project's own design professional) to resolve their disputes.<sup>152</sup> In the past several decades, the construction industry has been among the most prominent patrons of emerging ADR technologies. Given its history of adopting new dispute resolution techniques quickly,<sup>153</sup> some commentators have recognized the construction industry as a model for the industry-wide mainstreaming of ADR fora.<sup>154</sup>

Just as the ephemeral duration of itinerant trading-fairs spurred piepowder courts towards the "swift resolution of disputes with a minimum of procedural formalities,"<sup>155</sup> so the urgency of large-scale construction is especially suited to the expedited treatment ADR permits. A construction project succeeds or fails according to its work schedule. When disputes arise, timely resolution is essential, or else downstream subcontractors and owners suffer, and profits dwindle.

In construction industry parlance, disputes are commonly referred to as "claims." Identifying and managing these claims quickly and effectively is a vital part of all large-scale construction projects.<sup>156</sup> The variety of such claims is as infinite as the mistakes that can happen inside a complex construction project. The universe of construction disputes covers everything from bidding disputes, problems with site conditions, and subcontractor and owner delays, to coordination and financing problems, material shortages, insurance and surety issues, the warranty of habitability, design flaws, and liabilities for defects or unforeseen extra work.

While the parties must be prepared to manage such claims should they arise, preparing for every contingency beforehand raises transaction costs prohibitively. After all, both the origins and consequences of many claims will be unique. Even if they are not, such claims frequently involve technical subject matters, so that just discussing them requires both a "unique vocabulary" and a "frame of reference" inaccessible to non-experts.<sup>157</sup> The

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<sup>152</sup> JUSTIN SWEET, SWEET ON CONSTRUCTION LAW 38–39 (1997).

<sup>153</sup> See Stipanowich, *supra* note 63, at 67.

<sup>154</sup> See *id.* at 68; see also BARBARA ASHLEY PHILLIPS, THE MEDIATION FIELD GUIDE 223–36 (2001).

<sup>155</sup> Zywicki, *supra* note 111, at 1597.

<sup>156</sup> See PAUL LEVIN, CONSTRUCTION CONTRACT CLAIMS, CHANGES & DISPUTE RESOLUTION 8–18 (2d ed. 1998); see also American Institute of Architects, Form AIA A201, reprinted in *id.* at 186–87.

<sup>157</sup> James R. Madison, *Suitability of Alternative Dispute Resolution Processes for Resolving Construction Disputes*, in ADR: A PRACTICAL GUIDE TO RESOLVE CONSTRUCTION DISPUTES 11, 11–12 (Alan E. Harris et al. eds., 1994) [hereinafter A PRACTICAL GUIDE]. The author discusses the limited ability of juries to decide such matters as: "The beam might keep the floor from collapsing, but was sufficient account

many different kinds of expertise needed to develop a property, combined with the intricate partnerships required to ensure its completion, can create disputes that have repercussions too complex for most courtrooms.

Although construction claims are overwhelmingly disputes in contract,<sup>158</sup> the relevant documents acquire their meaning only in the context of the legal and social norms that exist within the industry—what some lawyers for the industry refer to as the “principles of construction law.”<sup>159</sup> Like the Law Merchant of the medieval period, the principles of construction law have legal implications but are shaped overwhelmingly by industry-wide social norms.<sup>160</sup> It is helpful to think of claims as having a norm-enforcing function, what Levin calls the industry’s “standard operating procedures.”<sup>161</sup>

Although the industry recognizes that claims arise primarily from confusions over contract,<sup>162</sup> contractors realize that perfect construction

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taken of deflection to make the floor useful? The shop drawing dimension were accurate, but were the bolt holes accessible to the worker in the field?” *Id.* at 11.

<sup>158</sup> See Mix, *supra* note 151, at 465.

<sup>159</sup> See LEVIN, *supra* note 156, at 4.

Interpretation and resolution of contract disputes is not limited to the contract documents. Trade custom and practice has significant meaning in how contractors prepare and carry out the plans and specifications . . . . The body of construction law and practices, informally referred to as the “principles of construction law,” are well established and have changed little in the past 20 years.

*Id.*

<sup>160</sup> We may compare contemporary construction law principles with Benson’s description of *lex mercatoria* as “customary law.” Both terms encompass practical rules of thumb as well as substantive law; both are eminently adapted to the reciprocal requirements of commerce. BENSON, *supra* note 100, at 30–35; see also Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 469, 471–522 (1998). In the construction industry, “ordering principles in the form of public (or external) law are often of secondary importance to discrete relationships and rules of provenance internal to the industry.” *Id.* This is achieved via “extensively integrated” contract documents. *Id.* at 469. Simply having normal working knowledge of the documents engineers rely on demands knowledge of construction law principles. A Manhattan mediator who specializes in construction disputes has disparaged the ability of lawyers to correctly interpret such documents: “[M]any . . . think a blueprint is a lithograph from one of Picasso’s early creative periods.” Gary Morgerman, Construction Mediation, Inc., *Anatomy of a Construction Mediation* (1996), available at <http://www.cminco.com/anatomy.html> (last visited Feb. 2, 2005).

<sup>161</sup> LEVIN, *supra* note 156, at 2.

<sup>162</sup> The standard form construction contract promulgated by the American Institute of Architects (AIA) defines a claim as “a written demand or written assertion by one of

contracts would entail prohibitive transaction costs.<sup>163</sup> Already, standard contracts have grown in the face of mounting concerns over legal risk, resulting in parties' nervous distrust of one another from the outset.<sup>164</sup> While it might be possible to fix contractually binding rules at the beginning of each new partnering, it is often more efficient to propagate and enforce industry-wide recognition of norms.<sup>165</sup> In this way, parties' claims on contract depend not simply on the written documents, but on "the rights, customs, and practices that comprise [construction law] principles."<sup>166</sup>

The crucial problem is how to apply those gap-filling principles when the parties to a construction contract fall into dispute.<sup>167</sup> Because non-expert decisionmakers typically do not properly understand the evidence in construction cases, it is possible in highly litigious environments for sophisticated lawyers—acting partly as free riders but also as client-centered advocates—to hijack the litigation process.<sup>168</sup> Technical discovery can be used to great effect in distorting the facts, especially where a judge or jury is

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the parties seeking, as a matter of right, adjustment or interpretation of contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." *Id.*

<sup>163</sup> *Id.* at 5.

<sup>164</sup> See Stipanowich, *supra* note 63, at 73.

<sup>165</sup> *Id.* at 66 (citing Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 879 (1978)). Stipanowich finds abundant evidence in construction law to support the theory that, "while the broader legal framework provides some assistance in assuring enforcement of provisions and fills gaps, effective governance of the relationship demands a structure which recognizes the specific character and context of the transaction." *Id.*

<sup>166</sup> LEVIN, *supra* note 156, at 4.

<sup>167</sup> The issue is how to abate a party's recourse to litigation in those situations where substantive law might afford better outcomes than would standard industry norms.

<sup>168</sup> See PHILLIPS, *supra* note 154, at 226. At the high water mark of industry-wide litigation, it was common for well-represented contractors to win contracts (especially public ones) by bidding low and then expanding their profit margin by litigating extra work claims. Such behavior prompted observations like this one from construction industry counsel:

Construction litigation has been lucrative for the legal profession. Provided the amounts in dispute are large enough, a construction case normally requires a large legal effort. Extensive factual investigation is the rule. Research of legal cases is extensive by reason of the complex nature of most of the precedent. Witnesses are numerous and diverse in their knowledge of the case. The sum of this is normally many documents, long hours, extensive depositions, large bills, happy partners, unhappy spouses, etc.

Robert Coulson, *What is ADR?*, in *A PRACTICAL GUIDE*, *supra* note 157, at 1.



devoid of the necessary expertise to reduce the dispute to its essentials.<sup>169</sup> As precedents make an increasingly sharp divergence from construction law principles, litigation intensifies. In the 1980s, at the peak of an industry-wide litigation "crisis," a third of all commercial construction projects wound up being litigated.<sup>170</sup> Ultimately, skyrocketing insurance premiums halted this seemingly inexorable litigiousness,<sup>171</sup> in turn prompting renewed interest in ADR techniques. Perhaps there is no better evidence of ADR's efficiency than its economic impact on construction liability and industry insurance premiums.

Reputable contractors increasingly seek out neutrals with construction expertise to help them settle ("manage") their claims rather than let them go to court.<sup>172</sup> Since "[c]onstruction disputes may often demand a high level of experience and knowledge on the part of decisionmakers,"<sup>173</sup> one of ADR's

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<sup>169</sup> The Army's Construction Contract Negotiating Guide warns:

Most contractors realize that . . . the less specific knowledge the government representatives possess, the more easily their judgment can be influenced. Consequently . . . the contractor will pass over a vulnerable point by presenting an abundance of information on the point, seemingly with good intentions, but actually with the aim of misdirecting . . . .

LEVIN, *supra* note 156, at 125 (citing U.S. DEPT. OF THE ARMY, OFFICER OF THE CHIEF OF ENGINEERS, CONSTRUCTION CONTRACT NEGOTIATING GUIDE 8-9 (1974)). Although the Army's Negotiating Guide describes this "misdirection" in the context of contract negotiations, judges face virtually identical scenarios when adjudicating claims. In one especially complex case, the presiding judge began pretrial by urging the parties to settle; 40 days, 41 witnesses, and 1,056 exhibits later, he felt it worthwhile to include these remarks in his published opinion:

In present day thinking, it seems to be the idea that any problem can be cured in a Federal District Court. This, I assure you, is an erroneous approach . . . . Lawyers in their zeal to represent their clients many times fail to see but one side of the litigation . . . . This litigation is not a one-sided bit of litigation, [sic] it is a five-sided bit of litigation . . . . [R]emember the courts do not create litigation, it is created by the litigants . . . . You litigants are in a fairly closely related field. Being trained in this field, you are in a far better position to adjust your differences than those untrained in these related fields. As an illustration, I, who have had no training whatsoever in engineering, had to determine whether or not the emergency generator system proposed to be furnished . . . met the specifications, when experts couldn't agree. That is a strange bit of logic.

E.C. Ernst, Inc. v. Manhattan Constr. Co., 387 F. Supp. 1001, 1005-06 (S.D. Ala. 1974).

<sup>170</sup> See PHILLIPS, *supra* note 154, at 225-26.

<sup>171</sup> *Id.* at 226.

<sup>172</sup> See Mix, *supra* note 151, at 468. Instead of relying on expert witnesses, parties may agree on neutrals with sufficient "knowledge and experience in the construction industry" to obviate the need for expensive testimony. *Id.*

<sup>173</sup> *Id.* at 469.

most important benefits is that it offers parties mutually-agreeable recourse to reputable experts. Just as piepowder courts depended crucially on the guidance of neutral merchants, construction ADR frequently relies on neutral intermediaries with construction expertise.<sup>174</sup> For the same reason, judges have incentives to recognize clauses in contracts that assign decisionmaking roles to third party experts.<sup>175</sup>

Beyond the evidentiary difficulties imposed by construction cases, the codified law in this area has yet to be made uniform. Because construction law is not regulated under a single formal code such as the Uniform Commercial Code,<sup>176</sup> contract interpretation proceeds in a "transactional" fashion, inviting the application of normative standards, but frequently requiring the contracting parties to reach agreement on specific courses of action. The evolution of decentralized industry norms is crucial for operating within a transactional regime.<sup>177</sup>

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<sup>174</sup> See H. Murray Hohns, *The Value of an Expert in Today's ADR Forum*, in A PRACTICAL GUIDE, *supra* note 157, at 299, 301–02 (describing that in the mediation of construction claims, a "neutral expert" may act either as an investigator or may help "teach the client what is involved"). Precisely because of the expertise required, judges will avoid construction litigation if at all possible, and will pass off to experienced special masters the frequently monumental discovery schedules such cases entail. See Charles M. Sink, *Special Masters: ADR's Last Clear Chance Before Trial*, in A PRACTICAL GUIDE, *supra* note 157, at 253, 253. "Trial judges loathe construction lawsuits." *Id.* Judges faced with this prospect increasingly invoke Rule 53(a) of the Federal Rules of Civil Procedure and appoint a special master. While Rule 53(b) requires that "[a] reference to a master shall be the exception and not the rule" (FED. R. CIV. P. 53(b)), in practice both the judge and the parties have strong incentives to consent to appointment. Sink, *supra*, at 255. Among the "Desirable Qualities" of the special master, Sink includes a "specialized knowledge of construction problems, methods, and terminology" including "a command of insurance law, suretyship, and construction financing," as well as (most importantly) "the respect and trust of all sides." *Id.* at 255–56. The rapidity with which many judges appoint special masters in construction cases may be further evidence for Robert Baruch Bush's prediction that courts will respond to ADR by integrating its strengths into their own court procedure. See Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades*, 15 REV. LITIG. 455, 460–62 (1996).

<sup>175</sup> See, e.g., *Grenier v. Compratt Constr. Co.*, 454 A.2d 1289, 1291 (Conn. 1983) (finding that clauses in contracts delegating controversial decisions to design professionals should be treated as valid conditions of satisfaction).

<sup>176</sup> Stipanowich, *supra* note 160, at 467 ("The transactional law of building design and construction stands in sharp contrast to the UCC approach to commercial transactions within its scope.").

<sup>177</sup> See Stipanowich, *supra* note 63, at 70–71. "As a backdrop for negotiation of relational conflict, the public legal system is only incidentally a system for cooperative

The production, consideration, and evolution of these norms may be aided by appropriate use of ADR. Increasingly, the construction industry has adapted ADR processes, including such unique industry practices as internal claim management,<sup>178</sup> partnering,<sup>179</sup> and Dispute Review Boards (DRBs).<sup>180</sup>

Recent growth in the industry's use of mediation, in particular, suggests that it may well become a norm all its own.<sup>181</sup> A majority of construction lawyers now report that it is not always necessary to engage in discovery before mediating a dispute, a belief generally shared by other expert consumers of mediation.<sup>182</sup>

The construction industry has many of the features of social groups most compatible with the development and evolution of optimal social norms.

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problem solving." *Id.* at 70. Frequently it is necessary for the parties to reach a normative, inner sense of reciprocity and fair-dealing that balances all interests:

[W]hile the broader legal framework provides some assistance in assuring that contract terms are enforced and the inevitable gaps are filled, effective governance of the relationship demands a structure which recognizes the specific character and context of the transaction and *embodies the norms which animate the relationship.*

*Id.* at 71 (emphasis added).

<sup>178</sup> See *supra* note 156 and accompanying text.

<sup>179</sup> See Mix, *supra* note 151, at 474–75 ("Partnering . . . is touted as the means for both building cooperation at the jobsite and for preventing disputes."). Because parties who work together focus on their goals (future-oriented), they may be more likely to avoid the sanctions and counter-sanctions that escalate a relationship away from optimal, mutual productivity.

<sup>180</sup> See Alan E. Harris, *Alternative Dispute Resolution in the 21st Century*, in *FUNDAMENTALS OF CONSTRUCTION LAW* 299, 302–03 (Enhada et al. eds., 2001). Dispute Review Boards (DRBs) originated with the Army Corps of Engineers, and have become popular with other public owners. Normally the contractor and the owner agree to select specific DRB members before construction begins. This group then helps manage conflict during the entire process. Like the merchant juries who served within piepowder, DRBs express the interests of the wider construction and owner community. "Because of their experience and their regular involvement in the project, DRB members are able to issue prompt, reasoned decisions." *Id.* at 302.

<sup>181</sup> See Stipanowich, *supra* note 63, at 108–10. Results of a 1994 study indicate that the more experienced respondents were with mediation, the more likely they were to engage in it early and often. *Id.* at 131–42; see Rogers & McEwen, *supra* note 72, at 842; see also *supra* note 83 and accompanying text.

<sup>182</sup> See Stipanowich, *supra* note 63, at 101. While many parties to mediation engage in pre-ADR discovery (96% of respondents favor using it sometimes), over half of those surveyed (60%) say that the use of mediation is appropriate without making formal discovery. *Id.* Interestingly, respondents rated the legal expertise of the mediator relatively unimportant compared to other variables (impartiality, management, and creativity, for example). *Id.* at 104.

What is more, industry members seem to have singled out mediation as an ideal means to further this end.

#### IV. CONCLUSION AND PROPOSAL FOR FURTHER RESEARCH

The main purpose of this Note has been to suggest that predictive settlement models are useful but incomprehensive. Like other law and economic theories of rational choices, such models fail to account for extra-legal incentives that frequently motivate people's choices—in this instance, disputants' choices to settle. Treating these extra-legal incentives merely as "transaction costs" is also deceptive, since social norms (ostensibly a kind of "transaction cost") can improve net social utility in ways that legal rules cannot. Under certain circumstances, the presence of reliable social norms may cause people to ignore legal rules.<sup>183</sup> Clients may especially find greater satisfaction from settlements that conform to social norms rather than to predictable legal outcomes, especially if this entails value-adding benefits, like the preservation of relationships or enhanced reputations.

The behavior of expert consumers of mediation suggests that mediation is maximally beneficial the *earlier* parties initiate it.<sup>184</sup> When disputants agree to mediate before formal discovery, customary practice and social norms are likely to be especially relevant, since the parties will not have invested as many resources into framing their dispute in strictly legal terms. Especially within small networks made up of members who repeatedly interact, mediation provides an ideal forum for private ordering. It affords disputants' the opportunity to assess, at their own discretion, the relative pertinence of legal rules, social norms, and personal interests. It also permits parties with disagreements to consider whether their customary behavior is actually efficient or not.

The ideas contained in this Note were born of a happy coincidence. While in the process of writing it, I was enrolled in Nancy Rogers' mediation practicum at the Ohio State University, a class that entails mediating small claims disputes. While mediating settlement conferences between tenants and landlords, I found that the parties quite frequently disregarded applicable *in terrorem* statutes in their settlement agreements, even when the tenants had cited these statutes in their original complaints and were aware of them. It occurred to me that these parties were behaving irrationally, for had they simply entered the courtroom, the tenants would surely have received larger

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<sup>183</sup> See *supra* note 7.

<sup>184</sup> See Rogers & McEwen, *supra* note 72, at 843–44.

awards.<sup>185</sup> Sophisticated landlords understood this, and their tenants probably did as well. Why then did they not include these punitives in their settlement agreements? An observation by Ellickson suggested the answer:

According to leading property casebooks, the development of an implied warranty of habitability was the capstone of the significant changes in landlord-tenant law that occurred during the 1965–75 period . . . (*citation omitted*) . . . [But an] observer of social norms should be skeptical of the supposition that this legal change had revolutionary effects.<sup>186</sup>

Just as the old rule of *caveat lessee* was probably too inefficient<sup>187</sup> to have sustained optimal distributions of costs, tenants who simply seek remuneration for costs unfairly borne are likely to overlook the “draconian pro-tenant remedies available.”<sup>188</sup> Severe remedies are also frequently available to tenants who can prove that their landlords held deposits unfairly. Interestingly, parties who mediate such disputes do not always consider these penalty damages relevant. Instead of settling under the shadow of the law, parties in mediation are more likely to settle according to basic principles of

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<sup>185</sup> Local ordinances frequently impose double damages or other penalties on landlords who fail to comply.

<sup>186</sup> Ellickson, *supra* note 4, at 543–44.

<sup>187</sup> *Id.* at 544. This is inefficient because the landlord, as the property’s owner, will usually have greater incentives to bear the risks and will typically be better equipped to fix the problem. Additionally, tenants and landlords will, more often than not, be locked into long-term relationships that foster reciprocity. Interestingly, my own uncorroborated observations suggest that these norms endure even *after* termination of the lease, contrasting with the view that “social norms [are] for ongoing relationships; state law [is] for endgames.” Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2056 (1996).

Very probably, such *in terrorum* statutes were created to deal with “slum” landlords. Because these property owners take larger risks (and face greater losses), they may have abnormal incentives to redistribute these costs to any tenant who will bear them. Such value distributions, once they become normative, degrade the social order (as anyone who has ever listened to the prejudices of a slum landlord may attest). Countering them requires public policies that engage law’s punitive capacity. See *supra* notes 2, 100. But because the law wields them against the crook, the simpleton, and the novice alike, it sometimes heaps one inefficiency on top of another. In such instances, simply placing the parties together with a neutral can facilitate greater awareness of the efficient social norm and its rationale. It may even provide an opportunity to engage in a “norm-advocating” process, whereby the mediator assists the offending party in gaining insight in to the larger repercussions of his behavior. See Waldman, *supra* note 27, at 754 (noting that norm-advocating mediation is especially useful for those disputes that “implicated important societal concerns and involved a vulnerable disputant”).

<sup>188</sup> Ellickson, *supra* note 4, at 544.

fairness and reciprocity (social norms). Therefore, they will tend to assign actual cost damages (including court costs and other collateral damages) to the person most obligated to bear them, but will stop short of demanding costs that are inefficient or irrational, no matter what their legal force. Of course, such anecdotal evidence is no basis on which to draw solid conclusions. What is required is actual data from mediated settlements,<sup>189</sup> so that deviations from predicted legal outcomes may be measured.<sup>190</sup> Nor need such deviations, should they exist, be cited as evidence of mediation's flaws. Rather, a deviation from predictive outcomes may result from precisely those qualities that make mediation uniquely valuable.

As Fuller recognized, mediation has the capacity both to generate and channel efficient social norms. Even when relationships are coming to an end (as in the case of expired leases), parties in mediation may still volunteer to step out from under the shadow of the law. In this case, they will choose to negotiate on terms that depend not on statute and precedent, but on reciprocity and custom.<sup>191</sup> Far from being a cause for concern, the layman's reliance on social norms can improve mediation outcomes.

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<sup>189</sup> Fortunately or not, the law is replete with inefficient and counter-intuitive rules, some of which are sure to be mediated at rates amenable for close study. Any small claims court in the country would probably do the trick. Although strict confidentiality is normally part and parcel to the mediation process, in my experience parties are generally willing to admit court-affiliated observers to mediation sessions. It seems quite feasible that parties might agree to sign a waiver for anonymous participation in a scientific study. In the interest of unbiased scientific inquiry, the requirements of the double-blind study should be implemented: Neither the mediator nor the parties must be aware that the dependent variable is settlement amounts. Recording not only abortive mediation, but also directly litigated contests would establish a baseline. The presence of, or consultation with, a lawyer might be another independent variable of some significance.

<sup>190</sup> See *supra* note 40 (describing several well-constructed empirical studies of settlements deviating from predictable legal outcomes).

<sup>191</sup> In my limited experience, I found that mediations frequently revolve around questions of how the parties should have proceeded, and how their friendships or business relationships deteriorated. Bargaining frequently entails not only threatened legal action, but also potential social sanctions.